

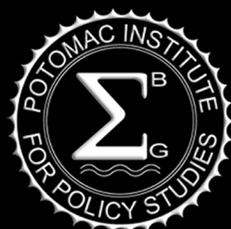
# Terrorism and the Rule of Law

## Selected Perspectives



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INTER-UNIVERSITY CENTER  
FOR  
**TERRORISM**  
STUDIES





# THE INTER-UNIVERSITY CENTER FOR TERRORISM STUDIES

## Terrorism and the Rule of Law: Selected Perspectives

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## Foreword

**Professor Don Wallace, Jr.**  
*Chairman, International Law Institute*

I strongly recommend reading this report from cover to cover. Professor Yonah Alexander has selected from a number of our programs, nine papers that pretty much tell the whole story of the many dimensions of counter-terrorism and the rule of law.

More precisely: both laws and the rule of law. The report deals with the domestic laws of nations, and not just the United States': is terrorism a matter of law enforcement or rather a matter of national security, or both. There are papers on international law, including the law of war, and international crimes.

And the rule of law: the overarching question whether nations coping with terrorism to protect the safety of their citizens can also protect their liberties and the constitutional order. The papers in the report are re-assuring in this respect.

More particularly, several of the papers deal with or touch on the vexed question of prisoners. For example, should countries pay ransom to terrorists for prisoners they have taken? Should there be exchanges of prisoners? Interestingly, there are laws that deal with the payment of ransom. But typically the question is not one of law, but negotiations with terrorists, which invariably take place. And not surprisingly, the public pressures on government are different in a small country, such as Israel, where everyone feels touched, and a large one such as the U.S.

The treatment of terrorists taken prisoner by us and our allies is discussed. GITMO is touched upon. More broadly, the law of war and particularly the Geneva Conventions are addressed, as is the background international law of *jus ad bellum* and *jus in bello*. Necessity, proportionality, and distinction (between the treatment of combatants and non-combatants), what are lawful targets for us, the legal aspects of the use of drones, all these are addressed. Distinction is an especially vexed question, since terrorists do not meet the normal international law requirement that combatants wear uniforms and insignia. Internal versus international conflicts are discussed as are the legal relevance of new and emerging technologies. The question of whether international terrorism (a term never defined according to some) is an international crime gets a full treatment.

Rule of law, as opposed to instrumental law questions, gets a full review. Yes, 9/11 brought forth the Patriot Act and other measures, but in the U.S. the FISA Court seems fully operational, superintending surveillance and its legal and Constitutional scope.

One paper even makes a plea for the value of legal reasoning in conceptualizing and coping with what has proven in recent years to be, if not an existential, surely a fundamental threat to our civilization, its serenity and our way of life. "Terrorism and the Rule of Law: Selected Perspectives" is an important study.

## **Introduction**

### **Counter-Terrorism Strategies and the Rule of Law: 9/11 and Beyond**

**Professor Yonah Alexander**

*Director, Inter-University Center for Terrorism Studies and Senior Fellow, Potomac Institute for Policy Studies*

As the United States has just marked the 16<sup>th</sup> anniversary of September 11, 2001, it is, indeed, an opportunity to reflect upon some of the strategic challenges of terrorism and assess what societies can do more effectively to combat them on national, regional, and global levels. Clearly, 9/11 represented the deadliest terrorist attack in world history, killing some 3,000 people and wounding thousands more. Both Americans and citizens from 77 other nations were casualties. Additionally, the political, social, economic, and strategic costs continue daily.

Although Usama bin Laden, the founder of al-Qa'ida and whose members perpetrated 9/11, was ultimately killed in a U.S. military operation conducted by Navy Seal Commandos in Pakistan on May 1, 2011, his terror network is alive and well under the leadership of Ayman al-Zawahiri. More recently, during summer 2017, al-Qa'ida affiliates in Iraq, Syria, Yemen, Afghanistan, Libya, Somali, Mali, India, Pakistan, Indonesia, and elsewhere were engaged in multiple terrorist activities against their perceived enemies.<sup>1</sup>

Moreover, beginning in 2014, a new terrorist group, namely Daesh (also known as the Islamic State in Iraq and the Levant or the Islamic State), emerged on the Middle East battlefield. It seized large swaths of land in Iraq and Syria in subsequent years. Beefed up by tens of thousands of volunteers or foreign fighters from more of 80 countries, Daesh used horrifying tactics to terrorize not only populations in the Middle East but also targeted the United States, Europe, and beyond. However, by September 2017, the movement has been losing its territorial control in both Iraq and Syria as the battle for its self-declared capital of Raqqa is in its final stages. Sadly, the threat from the virtual Islamic Caliphate continues, as demonstrated by low-level terrorist attacks by sympathizers and affiliated members in other regions.<sup>2</sup>

To be sure, in addition to al-Qa'ida, Daesh, and other networks such as the Taliban and Hizballah, to mention a few, the current and future perpetrators include “free-lancers;” mentally deranged; “martyrs;” single-issue political extremists; ideological-based groups; ethnic, racial, and religious movements; nationalist and separatist actors; and criminal and political mercenaries.

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<sup>1</sup> See, for example, several publications by Yonah Alexander and Michael S. Swetnam released on al-Qa'ida: *Usama bin Laden's al-Qaida: Profile of a Terrorist Network* (2001); *Al-Qa'ida Ten Years After 9/11 and Beyond* (2012); and *Al-Qa'ida's Mystique Exposed: Usama bin Laden's Private Communications* (2015); as well as “Al-Qaeda Leader Zawahiri Rallies Fighters in AQ Branches, Urges North African Branch ‘Teach the French a Lesson’” SITE Intelligence Group, 16 September 2017; and Joscelyn, Thomas. “The US Intelligence Community's newest assessment of the jihadist threat.” *FDD's Long War Journal*, 15 May 2017. <https://www.longwarjournal.org/archives/2017/05/the-us-intelligence-communitys-newest-assessment-of-the-jihadist-threat.php>.

<sup>2</sup> For instance, see *The Islamic State: Combating the Caliphate Without Border* by Yonah Alexander and Dean Alexander (Lexington Books, 2015); “Terror Threat Snapshot.” Homeland Security Committee, September 2017. <https://homeland.house.gov/press/mccaull-releases-september-terror-threat-snapshot/>.

Some of the terrorists' impulses cover a broad range of motivations. They consist of political discontent (ideological, anarchism, nationalism, and separatism), economic discontent (low living standards, lack of opportunity, unfulfilled expectation, and loss of squandered resources), and cultural discontent (class constraints, ethnic discrimination, religious intolerance, and environmental irritants).

There is also a long record of governments providing terror groups direct and indirect support (e.g. financial, training, intelligence, arms). Rogue nations utilize terrorist proxies to further their own country's interests. As formal, open, and direct malevolent actions undertaken by a government would call immediate attention to other states, using terrorist groups to carry out operations, such as assassinations and bombings, enables the government-sponsor to claim plausible deniability.<sup>3</sup> The role of Iran, Syria, and Sudan come to mind. Previously, Cuba, Libya, and North Korea were also considered state-sponsors of terrorism by the international community.<sup>4</sup>

What is of particular concern is that unconventional weapons – biological, chemical, radiological, and nuclear – are slowly emerging upon the contemporary terrorist scene. That is, as technological developments offer new capabilities for terrorist groups, the *modus operandi* of terrorist groups may subsequently alter most drastically. Reportedly, at least a dozen terrorist groups, in addition to al-Qa'ida and Daesh's networks, have shown an interest in acquiring or actively attempting to obtain weapons of mass destruction (WMD).<sup>5</sup> This worrisome trend presents a clear and present danger to the very existence of civilization itself.

Thus, while the probability of nuclear terrorism remains low in comparison to the use of other WMDs, the consequences for "super" terrorism could be enormous. If a nuclear bomb is stolen (or built by a terrorist group with reasonable resources and talent), an explosion of about one kiloton (one-twentieth the power of Hiroshima attack) in any major city could cause more than 100,000 fatalities and result in damages totaling billions of dollars.

Another dangerous emerging trend is the growing threat of cyber terrorism.<sup>6</sup> The expanding concern is that not only hackers and criminal crackers, but also terrorists will intensify the utilization of this form of electronic "warfare" as equalizer weapons.

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<sup>3</sup> See books on *Terrorism As State-Sponsored Covert Warfare* by Yonah Alexander and Ray S. Cline (1986) and *The New Iranian Leadership: Ahmadinejad, Terrorism, Nuclear Ambition, and the Middle East* by Yonah Alexander and Milton Hoenig (2007) as well as reports on "Tehran's Bomb Challenge: Crossroads, Roadblocks, and Roadmaps to Rapprochement?" (March 2014) and "Latin America's Strategic Outlook: Populist Politics, Health Concerns, and Other Security Challenges" (April 2017).

<sup>4</sup> "Country Reports on Terrorism 2016." United States Department of State, Bureau of Counterterrorism, July 2017. <https://www.state.gov/documents/organization/272488.pdf>.

<sup>5</sup> See selected works such as *Super Terrorism: Biological, Chemical, and Nuclear*, edited by Yonah Alexander and Milton M. Hoenig (August 2001); reports on "A National Blueprint for Biodefense: Leadership and Major Reform Needed to Optimize Efforts" (October 2015) and "Preventing WMD Terrorism: Ten Perspectives" (August 2017) that can be viewed at <https://www.iucts.org/publications/reports/>; Alexander, Yonah and Milton Hoenig. "Can we prevent ISIS's Domsday Revenge?" *The Times of Israel*, 21 December 2016. <http://www.timesofisrael.com/can-we-prevent-isis-doomsday-revenge/>.

<sup>6</sup> Alexander, Yonah and Michael S. Swetnam. *Cyber Terrorism and Information Warfare: Threats and Responses*. Transnational Publishers, 2001; Alexander, Yonah and Michael B. Kraft. "Counterterrorism Challenges: The Role of Technology." *The Huffington Post*, 17 December 2015. [https://www.huffingtonpost.com/michael-b-kraft/counterterrorism-challeng\\_b\\_8829860.html%20](https://www.huffingtonpost.com/michael-b-kraft/counterterrorism-challeng_b_8829860.html%20).

It is evident that the threat of “non-explosive” terrorist assaults is growing with every passing day.<sup>7</sup> Three contributing factors account for that reality. First, the “globalization” of the Internet makes government and industry efforts to control cyber attacks much more challenging than ever before. Second, there are now tens of thousands of hacker-oriented sites on the Internet, thus resulting in “democratization” of the tools to be used for disruption and destruction. With the step-by-step cyber “cookbooks,” the exploitation of Trojan horses, and logic bombs, electric *modus operandi* alternatives are becoming a permanent fixture of international life. And third, terrorist organizations have broken away from their place within the formerly bipolar world and have become multidirectional, causing further complications to our technologically vulnerable societies. These new developments have enhanced the threats and capabilities of terrorist groups to the degree in which they could forever alter our planet’s experience.

#### *Counter-Terrorism Strategies: An Overview*<sup>8</sup>

The vulnerability of modern society and its infrastructure, coupled with the opportunities for the utilization of sophisticated high-leverage conventional and unconventional weaponry, requires states, both unilaterally and in concert, to develop credible responses and capabilities to minimize future threats.

Ensuring the safety and interests of its citizens at home and abroad will therefore continue to be every government’s paramount responsibility in the coming months and years. Understanding the methods of operation employed by terrorists, identifying the threats and specific targets, both present and future, and realistically assessing the consequences that may result from acts of terror violence will assist governments and international and regional bodies, such as the UN and NATO, in confronting terrorism for the remainder of the twenty-first century.

Among the key counter-terrorism strategies that are often underscored by both practitioners and academics are governmental policies, the rule of law, organizational structures, intelligence, and a wide-range of other responses, including law enforcement, diplomatic, economic, technological, and military. Increasingly, the role of the public, such as educational institutions, religious bodies, and the media, are also mentioned as potential partners in this security effort.

Since our report focuses on “Terrorism and the Rule of Law,” this introduction offers a general overview for the contributions of our colleagues participating in this academic publication. More specifically, some facts must be understood in discussing terrorism

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<sup>7</sup> Coats, Daniel R. “Worldwide Threat Assessment of the US Intelligence Community.” Senate Select Committee on Intelligence, 11 May 2017. <https://www.dni.gov/files/documents/Newsroom/Testimonies/SSCI%20Unclassified%20SFR%20-%20Final.pdf>

<sup>8</sup> This section is based on the extensive data base of the Inter-University Center for Terrorism Studies (IUCTS) and the Inter-University Center for Legal Studies (IUCLS) as well as on Yonah Alexander’s lectures, studies, and reports prior and post-9/11. For example, he incorporated some topics from his unpublished report on “Legal Training” that was prepared at the George Washington University (1996); seminar on “Building the Legal Infrastructure to Counter Terrorism” (organized jointly by the U.S. Department of State and U.S. Department of Justice with participating countries in Asia in June 2002); presentation delivered on “Combating Terrorism” at an OSCE Annual Security Conference (June 2009); and draft paper on a project on “Legal Regimes to Combat Terrorism” that IUCTS and IUCLS co-sponsored with the National Defense University (2005).

and counter-terrorism. First, there are different varieties of terrorism. Terrorism comprises multi-level kinds of conduct. Terrorism is, however, essentially criminal acts that threaten individuals or a populace for the purpose of achieving some political objective.

For instance, the World Trade Center bombing in 1993 was perpetrated by an organized team of conspirators originating from outside of the United States and operated both outside and within the United States. In contrast, the bombing in Oklahoma City two years later was undertaken by a couple of people without very much structure to an organization and without ongoing conspiratorial missions.

A second fact is an understanding of the role of government in dealing with criminal matters. Governments are normally reactive rather than proactive. In dealing with counter-terrorism, a government has to be organized to handle whatever may arise. It must try to implement countermeasures before an act of terrorism occurs, however difficult this may be.

One way to analyze terrorism is to study it in terms of its phases. We can distinguish five phases. The first phase is preparation. With preparation, governments should think through a potential terrorist incident that might exist and plan how to handle it. In this regard, some of the major issues that come up in a situation where a terrorist takes hostages include how does the government react to hostage-taking or a threat to the safety of the population? Is the government willing to submit to the terrorist's demands?

U.S. policy-makers believe that the government cannot give in to terrorists. But at the same time, they recognize that it is often useful to negotiate with terrorists, not for the purpose of making concessions but at least to stall for time and see if something can be worked out short of giving in and making concessions to the terrorist.

It is not always possible to negotiate with terrorists because often they are fanatics. Nevertheless, negotiation can be a successful technique in communicating with a terrorist group, which may buy time. It may also furnish crucial information.

Another particularly important element to preparation is training. Based on the policies that have been made, the government (not only police and military forces, but also others such as the prime minister or the president, foreign policy specialists, public information people, mayors, etc.) should be trained in what to do in contingency situations. Part of this training has to include regular exercises and drills in which a simulation of a terrorist incident occurs to make certain that all plans and policies in place are going to work.

The second major phase of dealing with terrorism is prevention. Here, intelligence capabilities and the sharing of intelligence with other countries that have had experience with the same group of terrorists is most important. Governments should prepare watch-lists at ports of entry and take other steps to keep the terrorists from entering the country or at least to recognize them when they are there as well as take preemptive measures related to domestic actors and activities. They should, moreover, have a system for reporting major purchases of the kinds of devices, weapons, or explosives that might indicate that terrorist activity is taking place.

The third phase is the operational phase, responding to the terrorist once an incident takes place. Here again, depending on the state of the training and the ability to exercise, will be the capability of responding in appropriate ways. There are three kinds of responses primarily. The first is the response to the disaster itself. A second simultaneous response is the criminal investigation. The third response is public information.

A fourth aspect of dealing with terrorism is adjudication. Once the terrorist has been apprehended, it is essential to have a criminal justice process, which is both fair in terms of the constitutional rights or other rights that criminal defendants have generally and at the same time is effective in making sure that the evidence can be produced. The decision-maker structure (if it is a jury or tribunal) must be safeguarded so that it cannot be upset by terrorism itself. The apprehended suspect must be successfully incarcerated so that he cannot be rescued by the terrorists.

A fifth aspect of dealing with terrorism is education. The country needs to know at all times what are the terrorism threats. In general terms, the people must understand what the government is prepared to do to deal with threats, and once the incident happens, people must have access to accurate information. That can best be handled through a good education and information campaign before, during, and after a terrorist incident.

#### *Academic Context and Acknowledgements*

The advances of science and technology are rapidly turning modern society into an expanded target of conventional and unconventional terrorism. The dangers posed by perpetrators in the name of political ideologies threaten not only the stability of state and economic systems but democracy and individuals as well.

Recognizing these multiple security challenges to international peace and order, governmental, intergovernmental, and non-governmental bodies have pursued tactical and strategic responses to combat terrorism on national and global levels. Some critical approaches in this effort are to continue developing legal sources, policies, frameworks, and enforcement capabilities to reduce the growing risks perhaps to the very survival of civilization itself.

It is against this background that the Inter-University Center for Terrorism Studies (IUCTS) and the Inter-University Center for Legal Studies (IUCLS) established in the 1990s a "Security through Law" project. The purpose of this academic undertaking is to focus on the interface between terrorism and the rule of law. Special attention is placed on legal practices, lessons, and future directions in shaping and implementing counter-terrorism strategies. The guiding roadmap for this effort is to strike a realistic balance between security and civil liberties concerns.

It may be noted that this approach was initially developed in the 1960s at the State University of New York (SUNY) and subsequently continued in cooperation with other institutions in the United States, such as Columbia, American, Catholic, Georgetown, George Washington, and the National Defense universities. Law schools in numerous countries around the world, from Australia to the United Kingdom, have also participated in this effort. Currently, this project is administered by the Potomac Institute for

Policy Studies, the International Law Institute, and the Center for National Security Law at the University of Virginia School of Law.

Previous selected seminars have focused on the following topics: “From Terrorism to Genocide: Legal Lessons of the 20th Century” (May 1999); “Counter Terrorism Strategies for the 21st Century: The Role of International Organizations” (April 2000); “Ad Hoc Tribunals on International Terrorism: Lessons from Lockerbie” (December 2001); “Legal Responses to Terrorism” (October 2005); “A Counterterrorism Legal Agenda for the New Administration: U.S. and International Perspectives” (November 2008); “Legal Perspectives on Counter-Terrorism Strategies of Regional Organizations” (July 2009); “Terrorism and Civil Liberties: Security vs. Rights?” (July 2011); “Terrorism and Intelligence: Political, Legal, and Strategic Challenges” (July 2013); “The Fog of War: Is the Rule of Law Still Relevant?” (September 2014), “From Terrorism to War Crimes: Past Lessons and Future Outlook” (April 2015); “Combating Terrorism: The Role of Law Enforcement” (June 2015); “Terrorism Captives: Tactical, Legal, and Strategic Implications” (August 2015); “Combating Terrorism: The Role of Sharing Intelligence” (April 2016); and “European and U.S. Counter-Terrorism Strategies: Quo Vadis?” (June 2017).

Among the publications produced over the years, mention should be made of selected books, including *Counterterrorism Strategies: Successes and Failures of Six Nations* (2008); *Turkey: Terrorism, Civil Rights, and the European Union* (2008); *Evolution of U.S. Counterterrorism Policy*, 3 volumes (2008); *Terrorists in Our Midst: Combating Foreign Affinity Terrorism in America* (2010); *Perspectives on Detention, Prosecution and Punishment of Terrorist: Implications for Future Policy and Conduct* (2011); *Al-Qa’ida Ten Years After 9/11 and Beyond* (2012); *NATO: From Regional to Global Security Provider* (2015); and *The Islamic State: Combating the Caliphate Without Borders* (2015). Furthermore, several journals, such as *International Journal for Minority and Group Rights*; *Partnership for Peace Review*; *Terrorism: An Electronic Journal & Knowledge Base*, and reports like “Europe: Quo Vadis? (Political, Legal, and Security Perspectives)” (2015) and “Terrorism in North Africa and the Sahel in 2016” (part of an annual report series), have also focused on the issues related to the rule of law.

The current academic program for 2017 and beyond focuses the following topics: definitions; fundraising; the Suspect Citizen; the Suspect Alien; state-sponsored terrorism; conventional and unconventional weapons; criminal jurisdiction; sanctions; diplomatic aviation and maritime security; and reward programs. Other areas of concern are related to detention, prosecution, and punishment of terrorists. They include intelligence, surveillance, arrests, interrogation, rendition, civil trials, military tribunals, international court, limitations on media coverage, personal and governmental liabilities, prison sentences and treatments, targeted killings, and technical assistance and training.

This publication includes presentations from the following contributors: Colonel (ret.) Timothy G. Murphy (Former Senior staff member USAF and State Department and currently President of En Avant Consulting); Wayne H. Zaideman, PhD, J.D. (Former FBI Legal Attaché in the Middle East); Peter Roudik (Director, Global Legal Research Center, Law Library of Congress); Professor David Koplou (Former Special Counsel for Arms Control to the General Counsel of the Department of Defense; Deputy General Counsel for International Affairs at the Department of Defense; and as Attorney-Advisor and Special Assistant to the Director of the U.S. Arms Control and Disarmament Agency.

Currently, a Professor of Law at Georgetown University); Professor Nicholas Rostow (Former Legal Adviser, National Security Council; currently, Senior Director, Institute for National Strategic Studies, National Defense University); Issam Saliba (Senior Foreign Law Specialist for the Middle East and North Africa, Law Library of Congress); Professor Paul R. Pillar (28-year career in the U.S. intelligence community; Nonresident Senior Fellow, Center for Security Studies, Georgetown University); Ifat Reshef (Minister for Middle Eastern and Counter-Terrorism Affairs, Embassy of Israel); and Dr. Harlan K. Ullman (Senior Advisor at the Atlantic Council and Business Executives for National Security).

Finally, some acknowledgements are in order. Deep appreciation is due to Michael S. Swetnam (CEO and Chairman, Potomac Institute for Policy Studies); General (ret.) Alfred Gray (twenty-ninth Commandant of the United States Marine Corps; Senior Fellow and Chairman of the Board of Regents, Potomac Institute for Policy Studies); Professor Don Wallace, Jr. (Chairman, International Law Institute); Professor John Norton Moore (Director of the Center for National Security Law and the Center for Oceans Law and Policy, University of Virginia School of Law); and Professor Robert F. Turner (Distinguished Fellow and Associate Director, Center for National Security Law, University of Virginia School of Law) for their inspiration and continuing support of our academic work in the field of global security concerns.

As always, Sharon Layani, Research Associate and Coordinator at the Inter-University Center for Terrorism Studies, deserves special gratitude for her professional research, publication support, and management of our team of interns during the Fall 2017 semester, including Angel Chaverri (University of California Santa Barbara), Trev Hadachek (American University), Emily Kennedy (University of Maryland), Renae Lee (University of Maryland), Charles Murphy (American University), and Isaac Shorser (American University).

Finally, the views expressed in this report do not necessarily reflect those of the institutions associated with our academic work.

## Selected Perspectives

### Colonel (ret.) Timothy G. Murphy

*Former Senior staff member USAF and State Department and currently President of En Avant Consulting\**

The issue of prisons and prisoners in what we call, “The War on Terror” is indeed a critical and difficult issue. At least one nation – Israel – has a long experience with prisoners detained after participating in terrorist activity. A review of that experience should shed some light on what the United States and its allies might face in the protracted war in which we are now engaged.

Since its very early days and to a much greater extent since 1967, Israel has had the challenge of prisoners it has detained as the result of terrorist activity in Israel and in the occupied territories. The number has varied widely over the years. B’Tselem, an Israeli human rights organization reported the following in July 2013:<sup>9</sup>

- 4,827 Palestinian detainees and prisoners who are further classified as:
  - o 3,308 serving sentences: they have been tried, found guilty, and sentenced to prison terms of varying lengths;
  - o 1,150 held undergoing legal proceedings prior to trial;
  - o 232 Detainees; and
  - o 137 Administrative detainees.

The “Detainee” and “Administrative Detainee” categories, controversial even in Israel, are those Palestinians being held but who Israel does not want to bring to trial because of the possible loss of very sensitive intelligence sources and methods that would likely be compromised if the detainee was brought to trial.

The majority of these prisoners are held in quite secure facilities, most very isolated in the Negev Desert. There have been no major jail-breaks for terrorist prisoners from Israeli jails such as the West has seen over the past several months from terrorists imprisoned around the world. This is not to say that those arrested and imprisoned for terror activity in Israel are not returned from prisons to the streets. There are two ways prisoners have been released and returned to their Palestinian communities.

The first is by completing the period of their sentence. As noted in the statistics cited above, Israel manages to arrest, try, and convict the large majority of those they hold. Some of them complete their sentences and are released as in any normal prison system. Of course some of the worst offenders are serving very long sentences so that this opportunity is not available to them until late in life.

The other way prisoners are released is periodic major prisoner releases. Israelis release large blocks of prisoners for two major reasons:

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\* Presentation at event on “The Terrorists-Prisoners Challenge: Lessons Learned and Future Outlook” held on August 27, 2013 at the Potomac Institute for Policy Studies.

<sup>9</sup> Barak, Itamar. “Statistics on Palestinians in the custody of the Israeli security forces.” B’Tselem, 25 July 2013. [http://www.btselem.org/statistics/detainees\\_and\\_prisoners](http://www.btselem.org/statistics/detainees_and_prisoners)

The first and most common reason is as a “confidence-building” measure during active Peace Process negotiations. There are myriad political considerations for these releases: for internal Israeli politics, for internal Palestinian politics and, of course, for the stated reason of “confidence building.” These issues are beyond the scope of this article, but it will suffice to say here that these are politically very difficult decisions. Three of these releases are useful for illustration:

- In 1998, Israel agreed to release 750 prisoners as a confidence-building measure associated with the Wye River Memorandum; an interim agreement negotiated under the Clinton Administration to help achieve the goals of the 1993 Oslo Accords. Israel, as they commonly do, released these in groups and released up to 600 of them before confidence broke down and a change of Israel’s government halted the releases. The final tranche of 150 was never released.
- In 2005, along with Israel’s agreement to leave the Gaza Strip, Ariel Sharon’s government agreed to release 900 prisoners. 500 were released in a couple of groups before an increase in Qassam rocket attacks from Gaza caused Sharon to end the releases.
- Finally, starting in August 2013, there is an agreement to release 104 prisoners in four groups of 26. Most of these have been held for quite some time –prior to the Oslo Accords in the early 1990s. Israel released the first 26 in mid-August and, like at other times, will wait to see how much confidence is established before releasing additional groups. If the historical pattern holds, the entire 104 may never be released.

Israel also releases prisoners to exchange them for the return of their own soldiers being held prisoner. Though these are also controversial exchanges in internal Israeli politics, they seem to be less so than exchanges for confidence building. Most Israelis are willing to pay what is an increasingly high price in released prisoners in order to return even a single Israeli captive. Though these types of exchanges are not common, they do happen every decade or so, and two of them are significant for illustrating the phenomenon:

- In 1985, Israel exchanged over 1,150 prisoners for three Israelis being held by various Palestinian factions. The prisoners they exchanged included Sheikh Ahmed Yassin, a founder of Hamas who was subsequently rearrested, released again and finally killed in a 2004 IAF airstrike.
- In 2011, Israel exchanged 1,027 Palestinian prisoners for a single abducted soldier, Gilad Shalit.

Like everything in Israeli politics, prisoner releases and exchanges are quite controversial. There are multiple valid concerns with releasing large numbers of prisoners. Evelyn Gordon, in a *Commentary* article in May 2010, noted four major objections:<sup>10</sup>

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<sup>10</sup> Gordon, Evelyn. “Ransoming Gilad Shalit.” *Commentary*, May 1, 2010. <http://www.commentarymagazine.com/article/ransoming-gilad-shalit/>

1. *The unintended lesson that “Terrorism pays,”* especially in the case of releases to return abducted Israeli soldiers. This has indeed been the lesson many have drawn, especially in the wake of the prisoner release to bring home Gilad Shalit. News reports from the “welcome home” celebrations in Gaza included hearing chants of “we want a new Gilad!” and a member of the Saudi royal family reportedly offered \$1 million for a subsequent abduction of another IDF soldier.
2. *The risk of undermining peace progress* as the other side takes the lesson that violence brings greater progress than negotiations. In the world of Israeli/Palestinian peace negotiations, this is an unfortunate result of the large releases seen to this point, simply because the releases for abducted IDF soldiers have been so much larger and more dramatic for “all at once releases” rather than the oft-interrupted partial releases associated with confidence building.
3. *The risk of resumption of terror activity by released prisoners.* This again is a real risk. Though the public data seems to be limited, one effort by the Israeli Almagor Terror Victims Association in 2006 studied 6,912 prisoners released between 1993-1999 and found 854 (12 percent) rearrested for murder or attempted murder in subsequent years.<sup>11</sup> Obviously, the total percentage that returned to terror operations would be somewhat greater than that number. In fact, many Israelis trace the 1987 Intifada to the massive release of prisoners in 1985 for three Israeli soldiers noted earlier.
4. Finally, there is a *risk simply of showing weakness* in an environment where any sign of weakness can be dangerous.

Despite these misgivings, Israelis appear to be willing to take on all these risks, though as noted earlier, their willingness is much greater for the cause of the return of an Israeli in captivity than it is for simple confidence building.

Israel has faced at least two other issues on security prisoners over the years: hunger strikes and prison riots.

Palestinian prisoners have occasionally undergone hunger strikes. Three of the largest include:

- In 2001, over 1,000 prisoners went on a hunger strike for one month over prison conditions.
- In 2011 and 2012, somewhere between 1,500 and 2,500 prisoners – depending on the reporting source – joined a hunger strike. This strike was set off by Khader Adnan and became a general strike in protest to the Israeli practice of “administrative detention” without charging and trial. Adnan nearly died before Israel agreed to a shortened sentence and other concessions.

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<sup>11</sup> HaLevi, Ezra. “Report: Released Prisoners Later Carried Out Fatal Attacks.” *Arutz Sheva*, September 8, 2006. <http://www.israelnationalnews.com/News/News.aspx/111648#.Ug5WwBai3rs>

- A 2013 hunger strike by several dozen prisoners is largely over. The most famous of these is Samer Issawi, released from prison in the Gilad Shalit deal and rearrested for violating the terms of his release. Issawi remained on a hunger strike for several months. After his health declined significantly in April 2013, Israel agreed to release him with only eight months additional prison time.

Palestinian prisoners have occasionally also rioted. There were major riots in Israeli security prisons for a variety of reasons in 2003, 2007, and 2013. None of the prison riots seem to have accomplished anything other than destroying parts of the prisoners' accommodations.

Given the Israeli experience, several predictions are possible relating to terrorist prisoners held now by the United States and our allies:

- There will continue to be a much higher risk of prison breaks and escapes for the U.S. and its allies than exists in the Israeli experience. Israel has a limited number of very secure prisons and most are geographically isolated in the Negev Desert. With the exception of Guantanamo Bay, many prisoners are held by U.S. allies or in locations less isolated from people and forces friendly to those held.
- On the other hand, the U.S. will not face the constant pressure Israel experiences to release prisoners for peace process confidence building. This does not mean the U.S. will not experience it. In late July 2013, the Obama Administration reportedly planned to release five prisoners from Guantanamo Bay as a "good will" gesture to the Taliban. The release has yet to be played out, but if the Israeli experience holds, one should not expect much in the way of peace progress from releasing prisoners.
- Only a few U.S. soldiers have been abducted by terrorist organizations in recent experience, with the single exception of Sgt. Bowe Bergdahl held by the Taliban in Afghanistan or Northern Pakistan since late June of 2009. There have been consistent rumors of a deal to release Guantanamo Bay prisoners in exchange for Bergdahl. In fact, a reported release of five prisoners may have been for exchange as much as confidence building though he has not been returned as of this writing. Because of the high profile and high-payoff of holding an American soldier, additional attempts at abducting soldiers should be expected for the purpose of forcing the release of either large numbers or very high-profile terrorist prisoners.
- Though the circumstances differ on how terrorists are released – in the Israeli experience it is more from choice and in the current U.S. experience it is more from prison breaks – one should expect a significant number of them to return to terrorist activity. A 2013 DNI report claimed a total of 16.1 percent of Guantanamo Bay prisoners released reengaged in terrorist activity, while an additional 11.9 percent are suspected of reengaging.<sup>12</sup> These numbers are in the same range as the previously cited Almagor report. Both are likely low because of limited data. The U.S. and its allies should be particularly vigilant in the period after large

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<sup>12</sup> "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba." January 2013. <http://www.dni.gov/files/documents/March%202013%20GTMO%20Reengagement%20Release.pdf>

numbers of prisoners are released or escape. Though there are no good data on escapees, it would be quite surprising if the recidivism rate for escapees is not very high.

- Hunger strikes will be a continued prisoner tactic in both cases. The United States, at least at Guantanamo Bay, seems to have handled this issue better by forcible intravenous feeding in order to keep a prisoner's health from deteriorating.
- Finally, there are likely to be continued prison riots in both cases, though the experience does not seem to accomplish any more than gaining some headlines for a day or two, and should be handled by normal prison riot counter-tactics.

In summary, though the situations are different, U.S. experience with security prisoners will likely have many of the same characteristics as in the Israeli experience: continued controversy over those held without trial, pressure for releases to build confidence in negotiations, a strong pressure to release large numbers of prisoners in return for captive American soldiers – and with it the constant threat of additional abductions – and occasional experience with hunger strikes and prison riots. Because of the open-ended nature of terrorist prison sentences, the United States and its allies are likely to face these issues for decades, not just a few years.

**Wayne H. Zaideman, PhD, J.D.**  
*Former FBI Legal Attaché in the Middle East*

**Part One\***

*Introduction*

Not only can counterterrorism and democracy co-exist, they have done so for many years, and continue to co-exist. The War on Terrorism does not overstep the conventions of democracy.

I will briefly discuss the evolution of the FBI's strategies to counter international terrorism; cooperation of friendly foreign intelligence services; the need to respect and safeguard intelligence sources and methods; and the need for secrecy.

*Counterterrorism Strategies*

Since September 11, 2001, the FBI has undergone a huge "cultural change" when it comes to countering international terrorism. The investigative strategy changed from reactive – from waiting for a terrorism crime to occur and then to investigate and prosecute the perpetrators (e.g., they blow it up and we show up) -- to one of prevention. The FBI is tasked to prevent, disrupt, and defeat terrorist organizations before they are able to strike the United States or U.S. interests. After 9/11, the FBI changed its emphasis on treating terrorism as just another crime – conducting traditional criminal investigations -- to treating terrorism as an intelligence investigation where the emphasis is on pro-action.

The US Patriot Act increased the ability of law enforcement agencies to search telephone, emails, medical, financial, and other records; eased restrictions on foreign intelligence gathering within the U.S.; provided authority to regulate financial transactions involving foreign individuals and entities; and enhanced the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts.

It took the implementation of the Patriot Act to assist the FBI in conducting its investigations. For one thing, it never made sense to have an artificial "Chinese Wall" requiring separate parallel investigations on intelligence/terrorism cases and criminal investigations. Counterterrorism investigations have elements of both intelligence and criminal activities. To have different agents on different squads working separate cases and not communicating with each other about facts of the cases was never efficient, effective, or logical.

It should be noted that the FBI never violated federal wiretap laws in conducting intelligence/counterterrorism investigations, including the use of physical searches and electronic surveillance. U.S. federal judges heard cases requesting these tools in the Foreign Intelligence Surveillance Act (FISA) courts. Thus, the FBI always sought court approved searches and electronic surveillance.

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\* Presentation at an event on "Can Counterterrorism Strategies and Democracy Co-Exist?" held on November 7, 2013 at the International Law Institute.

Guantanamo Bay is a facility that holds detainees who have been classified as “enemy combatants.” Many individuals have since been released; more than a fifth have been cleared for release but must nevertheless remain because their home countries are unwilling to accept them. It would be a grave mistake to bring the remaining detainees to the United States and put them on civilian trial as “ordinary criminals.” If the evidence is not strong enough, or if evidence cannot be used due to sources and methods concerns, they could end up walking our streets and posing a military problem within our borders.

It would be a shame to return to the days when the FBI treats terrorism cases as mere crimes. When we changed to an intelligence investigation strategy, it was much easier to work with other intelligence agencies, and military intelligence. Getting a U.S. Attorney’s office and grand juries involved in the investigative process complicates the willingness of intelligence agencies and the military to be effective partners with law enforcement. In addition, when the U.S. seeks out effective liaison relationships with foreign intelligence entities, they are reluctant to share intelligence information if it will be broadcast to the public in a civilian court setting.

### *Foreign Cooperation*

A prime example of the FBI’s use of foreign cooperation is the Legal Attaché (LEGAT) program. The Legal Attaché is the FBI Director’s personal representative abroad. The LEGATs also act in a legal and democratic manner. What is the U.S. statutory authority to conduct investigations overseas? The answer is there is absolutely no authority. The FBI is not able to conduct any investigations overseas. Rather, the LEGATs rely on effective liaison with the police, security services, and intelligence services of the host countries where the LEGATs work. The Host countries conduct the investigations according to their own laws. Through mutual trust and cooperation, the LEGAT attains and furnishes assistance in investigations where there is a nexus to the United States.

Any request for evidence to be used in a legal proceeding is obtained through established consular channels. When we request such material, it is done through formal requests for legal assistance known as “Letters Rogatory,” and often within the provisions of a Mutual Legal Assistance Treaty (MLAT).

Rendition is used to transfer captured terrorist subjects from one country to another for detention, arrest, and interrogation. The subjects will be afforded the legal protections in place in the country detaining and interrogating them. The information obtained can then be provided to and used by U.S. intelligence and/or law enforcement personnel. In 2007, CIA Director Michael Hayden stated: “The renditions have been conducted lawfully, responsibly, and with a clear and simple purpose: to get terrorists off the streets and gain intelligence on those still at large.”

### *Information Provided by Foreign Governments*

The United States must be careful to use information obtained from foreign governments in the manner it is requested and granted. If information is sensitive and given to the FBI for lead or intelligence purposes only, it should not be used in a criminal trial or other public proceeding. If we do not honor these requests, we will lose trust and

credibility; and we will lose valuable sources of information. This brings me to the last point – the need for secrecy in the War on Terrorism.

### *Secrecy*

In the article “Leaks Amplify Iranian Threats” by James Phillips of The Heritage Foundation on November 30, 2010, it was stated that:

The illegal revelation of more than 250,000 State Department documents last weekend by WikiLeaks organization is a damaging setback for U.S. foreign policy that will strain relations with important U.S. allies, undermine U.S. national security interests, and complicate international cooperation on many issues, including the war on terrorism...This reckless release of diplomatic cables erodes trust in the U.S. government and puts at risk American diplomats, military personnel, and intelligence professionals, as well as foreign officials and activists they have interacted with in the course of their duties....Effective diplomacy requires building mutual trust with foreign leaders and maintaining the confidentiality of information shared about global issues, negotiations, and policy debates... foreign officials will be more reluctant to speak frankly for fear of seeing their words publicized in future leaks.

Therefore, we must not take backward steps in fighting terrorism. We must continue to treat counterterrorism cases as intelligence investigations, maintain the use of the Patriot Act, maintain the use of GITMO, recognize the benefits of cooperation from friendly foreign governments, recognize the need to respect secrecy, and pass tougher laws to safeguard secrecy and conduct tougher enforcement of these laws.

## **Part Two\***

When I took a crisis hostage negotiations course in the FBI in the early 1990s, it was focused on criminal hostage takers. I asked the instructor, “Do we treat terrorist situations differently?” He said, “You would handle criminal and terrorist hostages the same way.” I believe that was incorrect at that time and it is incorrect now.

The hostage negotiators taught us that when you have a hostage negotiation or barricade situation where a crime has gone wrong and they have taken hostages; or there is a domestic dispute and there is a feeling of desperation by the hostage takers; or somebody who wants to commit suicide by cop by having a policeman shoot him, and there are hostages involved, they said that the first thing that people tend to want to do is to work on problem solving and then the behavioral change. Hopefully the behavioral change is “hands up,” and they surrender. But, that rarely works unless you precede it with three other actions. The first is active listening. You mirror what the hostage taker is saying, in effect letting him tell his side of the story. Then, you bring empathy into it; you want to determine how they feel. Then you want to gain rapport and gain his trust. Once this process gains momentum, you try to gain influence with the hostage taker,

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and work on problem solving with the hostage taker and bring about the behavioral change.

However, this has very little relation to modern day hostage taking by Islamic extremist terrorists. Let me go into a little bit of history before I explain the Islamic extremist ideology. In 1986, President Ronald Reagan transferred arms for seven hostages in Lebanon, and he finally admitted the transfer of arms, but said that it was not done to get the hostages released, but rather, it was to foster better relations with Iran. However, the end result was that it became a revolving door. You pay for hostages, and they release some; then they take more hostages.

In 2002, President Bush had a policy that ransom can be paid if officials believe doing so would help gain intelligence about the terrorist groups or the individual terrorists. The U.S. should not pay ransom for the sole purpose of freeing American hostages. The U.S. does not want to encourage more terror, and does not want to materially support terrorism.

The relevant statute is 18 U.S. Code § 1203, which discusses the seizing or detaining of U.S. citizens outside the United States. Our newly adopted policy is similar to this statute. You can negotiate but no concessions, no ransom, no change in U.S. policies to reward the hostage takers. The one change is that while we can urge the American citizens not to pay ransom, if they want to do it anyway, we provide basic logistical support and help with contacts with the host governments. It should be noted that the Department of Justice has never, and I repeat never, prosecuted anyone for paying a ransom.

Recently, President Obama swapped five top Taliban commanders in exchange for Army Sergeant Bowe Bergdahl. The rationale that he used was that we do not leave any of our Soldiers behind once a conflict is over. However, in my opinion, Sergeant Bergdahl lost this covenant owed to our troops when he deserted and when he collaborated with the enemy. In this case, he lost the right to have the United States release five top Taliban commanders for his return.

In 2002, the National Criminal Justice Reference Service pointed out that the Hamas modus operandi is to kidnap Israeli soldiers or civilians to bargain for the release of their prisoners. It should be noted that Israel's policy was no concessions and that they relied on hostage rescue operations. However, due to public pressure -- Israel is a small country and people tend to know each other -- Israel began releasing prisoners. There was some criticism of Israeli government officials for releasing those prisoners who "had blood on their hands."

Why should negotiations with Islamic extremist hostage takers be treated differently? I must note that Islamic extremist terrorists are not concerned about public opinion. They do not care about public opinion. Their only audience is God. Their validation comes from God. As a result, there is no need to minimize casualties. In fact, it is fine for them to maximize casualties. It is fine for them to do barbaric things like beheadings, burnings, drownings, and crucifixions. The leadership believes that they know what God wants of them. For example, in Iran, the mujtahids (religious scholars) rule on behalf of the hidden imam until his return; they are tuned to God's wishes. Once the citizens of a country empower the clergy to speak on behalf of God, they are forever precluded from

criticizing the clergy. It would be like criticizing God himself. Thus, terrorism becomes an act of religious expression; a sacred act.

Historically, the “people of the book,” which refers to monotheists, such as Jews or Christians, were a protected status. While they were persecuted at times, had to pay exorbitant tax rates, and were considered second class citizens, at least they were protected from being killed. However, Islamic extremists get around this protected status. Instead of people of the book, they refer to Jews, Christians, or fellow Muslims (who oppose them) as *mushrikeen*. A *Mushrik* is a pagan or a polytheist. So, by changing the label from “people of the book” to “*mushrikeen*,” anyone can become a fair target – Christian, Jew, or fellow Muslim.

Lands that were once Islamic are part of the Islamic *waqf* (Islamic entity) until the end of time. So, giving up any land is nonnegotiable. For example, Spain was Andalusia, and at one time was under Islamic rule. Israel at one time in history was under Islamic rule. Thus they are precluded from negotiating or giving up any part of these lands. It is considered an obligation on them to wage jihad until either the people are willing to be ruled under Islamic law or they decide to convert to Islam.

Now what is my solution? We cannot win any war if we worry about political correctness and collateral damage. These worries paralyze our political leaders into inaction. It is true that we must identify the enemy. The enemy is Islamic extremist terror. While we all agree it is important to try our best to limit civilian casualties, we cannot become paralyzed from taking action for worry that there will be some collateral damage. If we were paralyzed in this way during World War II, we would have lost the war. We must identify the enemy and allow the military to succeed in its mission. During World War II, if we were worried about collateral damage, we would not have bombed Dresden and we would not have bombed Japan. We would not have obtained an unconditional surrender. Politically fought wars end very badly. We must fight to win and obtain an unconditional surrender. If we go back to a position of military and economic strength we can deter war. With weakness war is inevitable.

**Peter Roudik**

*Director, Global Legal Research Center, Law Library of Congress\**

First of all, I have to start with a disclaimer that I am here on my own and everything that I say today does not represent my employer. Also, I would like to emphasize that my talk will be based on information from reports prepared by my colleagues, foreign law specialists at the Law Library of Congress, and publications in the Library's Global Legal Monitor.

It is symbolic that this panel is conducted on a day when a democratically formed liberal government that was afraid of being accused of violating anyone's rights was overthrown by a domestic terrorist group in a large country with a relatively well-off population. It happened ninety-six years ago, on November 7, 1917, in St. Petersburg, Russia, and this event is now known as the Bolshevik Revolution. Did countries learn their lesson? Can they fight terrorist threats and remain democratic at the same time? Yes, that is possible.

I will give you just a few examples of recent court decisions and legislation passed in major European countries showing how the fight against terrorists can go within the existing rule of law system.

Let us start with another event that occurred on this day in 2007. The Higher Regional Court in Dusseldorf, Germany convicted three people of abetting terrorists and membership in terrorist organizations. This trial continued for more than 18 months, and more than 200 witnesses testified. The trial was suspended several times for receiving instructions and resolutions of higher courts, mostly on procedural matters. At the end, these terrorists received 7, 6, and 3 and a half year prison terms that were considered unusually high by German standards. This was a long and difficult trial but it created a proven model for future terrorism-related judicial proceedings in Germany.

Also, in early November 2012, the Supreme Court of Canada evaluated its national anti-terrorist law and said that it is constitutional, and terrorists who are accused of travelling out of the country to participate in terrorist activities or terrorist training can be restricted in specific rights. Such travel can be considered a crime, and they can be held without charges by authorities. They can also be extradited to the United States even in the event that they will be prosecuted there or sent to Guantanamo. I can give you other examples when countries reassessed their legislative and legal procedures while deciding on how to counteract activities related to terrorism. Several years ago, in Denmark, a group called Fighters and Lovers was prosecuted for distributing t-shirts because proceeds from sales went to Palestinian organizations which were recognized as terrorist groups and banned under the European Union law. The group appealed; and the appellate court sustained punishments and confirmed the validity of laws applied.

This shows that when governments do everything within the rule of law system and follow the due process procedures, they can successfully denounce and deter terrorists

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and their allies. Policies of denouncement and deterrence are recognized by the European Union and are included in legislation of different European countries. These laws are based on the already cited UN Resolution 1373. Two major documents following this Resolution are the Decision on Combatting Terrorism, which insisted on introducing a common definition of terrorism and asked countries to introduce effective penalties, and the European Arrest Warrant document which coordinated search, arrest, detention policies and practices in different countries and introduced mutual recognition of court orders. This was revolutionary for European countries. They got rid of old criminality rules in cases related to terrorism offenses and amended legislation covering all areas related to the fight against terrorism, such as immigration, surveillance, terrorism financing, and enforcement of laws. In each country laws depend on domestic principles, domestic policies, and constitutional principles. In some countries, legislators followed regular criminal law, in others they passed special anti-terrorism provisions and introduced specific procedures. For example, checks for individuals were imposed in Greece, Spain, and Malta, countries which require passports and national identification documents for their citizens. In Germany, where resident registration is required, enforcement became even stricter.

Of course, there are national specifics in implementation of these norms. Let us look at the length of detention without charges. In Canada, it can continue three days only. The Anti-Terrorist Law of England established a 28-day limit, and it is the subject of huge discussion. There were attempts to extend the detention period to 42 days and they did not make it through the Parliament. From three days in Canada, preliminary detention can go to three months in Pakistan, and even to 10 years in Turkey, a term which can be extended three times. Turkey is criticized by the European Union for this policy but this policy stays.

It is important to look at the existing enforcement practices and review how the countries implement their laws. For example, in the United Kingdom, this 28-day detention period is not used up to the limit. Since 2006 when this law was passed, only six people were kept for the duration of the entire period. For most of the people, the detention was seven days, and 1/3 of suspects are kept in pre-charge detention one day only. This proves that the government does not abuse its authority of detaining people without bringing formal charges. Also, the government introduced control orders, new measures similar to home arrests and confiscation of materials related to terrorism acts before trial. It was the matter of serious discussion, including the issue whether the damages incurred by the alleged terrorists during their home arrest should be compensated by the government. Several courts confirmed the validity of the control orders.

An important recent development was the inclusion in domestic legislation of provisions that would cover the acts committed outside the country. Some nations (Germany, Spain, Italy, England) had the experience of dealing with the terrorists before September 11, 2001, but their laws covered domestic terrorism acts only. Of similar significance was the recognition of international authority to prosecute people for being trained or helping terrorists abroad.

I will follow the conclusions that the fight against terrorism will be effective and efficient if done within the rule of law. Current judicial practice gives us examples of finding legal solutions for particular questions. Not long ago, a British court said that government decisions to freeze funds of people related to terrorists' activities cannot extend to

entitlements and social security benefits, and shall be limited to assets only. The government was concerned that social security funds given to wives and other family members of people accused of terrorist activities can indirectly be given to people accused of such activities. However, the courts said that people are entitled to benefits and government support cannot be stopped because of crimes committed by another family member. This is a good example of judicial control and ensuring that the fight against terrorists is conducted under law. An even better example that laws work and that the fight against terrorists conducted within the existing legal framework can be successful and damaging to terrorists is, in my opinion, a statement issued by al-Qa'ida of Maghreb in November of 2012 when they requested the Islamic government of Tunisia to abolish their anti-terrorism law, especially the provisions on money laundering and military training of terrorists.

While some countries try to follow the rule of law framework precisely, others undertake measures which might be considered more or less outside of the legal field. For example, Russia passed a new law that allows courts to make a decision to obligate relatives of the terrorists to pay damages to the victims of terrorist attacks. There are some nuances defining when these decisions can be made but the introduction of collective responsibility remains legally questionable. Some Russian proponents of this law state that it echoes the Israeli practice of demolishing terrorists' houses. This comparison is not accurate because this practice is based on British regulations of the World War II period, and was confirmed by the Supreme Court of Israel. There was a 2009 ruling which said that "the pity of terrorist attack victims will outweigh the pity of several people who lost their property" and shall serve as an important deterrence factor.

Today, most of the European Union countries are better prepared to deal with the terrorism threat than immediately after 9/11 attacks. Then, legislation of European countries limited their ability to conduct extraditions or prosecute particular types of activities. Now laws of these nations are more in line with international standards and norms, and there is better cooperation between US authorities and these countries. I can give just a few examples: SWIFT agreement on bank data transfer, airline passenger data transfers, court rulings which recognize inadmissibility of claims of people who request not to be extradited from the European Union to the United States, and increased recognition of diplomatic assurances given by the United States authorities that people will not be tried by military commissions.

All mentioned examples are not a recipe for how to preserve democratic values and fight the terrorist. However, they prove that if governments pay attention to due process, avoidance of vague definitions in legislation, provide victims and accused persons with access to lawyers, make pre-trial detentions of sensible length, and make application of laws consistent, there are more assurances that this fight will be effective, supported by society, and will help further de-radicalization of terrorists and disengagement of those people from terrorist activities.

**Professor David Koplow**

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What I would like to do is to put before you four propositions about the fog of war, about the nature of law, and, in my case, especially about international law in our current environment. Four contestable propositions that I am hoping we will contest and we will spend most of our time talking about the validity of these arguments.

But even before I launch into that, I would like to recite for you a brief passage that in some ways underpins, or inspires, my views on these four propositions. It is a quotation from Louis Brandeis, the associate justice of the Supreme Court, and I am sure many of you are very familiar with this passage. It comes from his dissenting opinion in the 1928 case of *Olmstead versus the United States*, which was the first time, really, that the Supreme Court had to deal with wiretapping as a legal matter. In his opinion, Brandeis wanted to caution us about the time to be most apprehensive about the possibility of government overreach, or government intrusions into civil liberties. The time to be most concerned was when the government was acting with apparently benign motivations, when the government was doing the kinds of things that we want governments to try to do to promote the common defense, to protect public order. Those were the periods of greatest danger.

Brandeis wrote, “Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel the invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.”

With that I would like to launch my four propositions. The first of these is the argument that law matters; international law matters in our fog of war world. This is, on those terms, a fairly modest claim. But it is a claim that is refuted, is disputed by many skeptics or realists who would claim that law is merely epiphenomenal; that really what countries do is base their behaviors on a very hard nosed calculation of self-interest. They do what is in their interests regardless of what the law might seem to require. I concede that there is a substantial amount of merit to that view, but I think that law does matter and it matters in a variety of ways. Let me sketch out three of them.

First, international law matters in the foundational way of setting up the institutions, the organizations, the procedures through which states communicate and do business with each other. International law provides the rules of the road of the international community, and as with all other rules of the road, that facilitates a great deal of international traffic and communications. As with rules of the road, it really does not matter fundamentally whether in a particular country people drive on the right side of the road or drive on the left side of the road; but it is really important that they all drive on the same side of the road. International law provides that kind of support for the aspirations

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of the international community. This function of international law is called by some the “wise restraints that make us free” – the ability to give up a part of a state’s sovereignty to accept a system of rules that provide even greater returns on that investment.

Second, international law matters in the sense that it creates legitimacy. It creates senses of expectations and reliance about how others will behave, and that factors into the reputation of states; it affects their calculation of self-interest. Even the most self-serving country has to be aware that if it behaves in a way that might seem to benefit itself, and if that behavior conflicts with the expectations of the world community and generates an adverse reputation that makes other countries reluctant to do business with it in the future, that kind of cost factors into the utilitarian calculation both in the long-term and short-term.

And finally, most importantly, international law matters because it creates rules about how states should behave, including the most fundamental matters of *jus ad bellum* and *jus in bello*. It tells states what they can and cannot do in a number of the most important circumstances. In making this part of my claim, I have to be careful not to overstate. I do not want to assert that international law is always complied with, any more than one could assert that domestic law is always complied with. Even in a country like the United States, perhaps the most over-lawyerized society in the world, we all know that as a matter of domestic law people and corporations and other players violate the law all the time. Why should we be so surprised if countries behave in a similar fashion in the international arena?

In fact, let me just note for you a little exercise that I often do with my international law classes when we are debating the important topic of “Is international law really law?” and try to make the comparison between compliance with international law and compliance with domestic law. How many of you have violated a law today? Most people cannot go twenty-four hours without breaking a law, whether it is speeding on the beltway or j-walking across M street or paying an illegal nanny or fudging on your income taxes. Most people do that all the time, and I should not be surprised when countries behave with a similar pattern of behavior.

The best statement, I think, about compliance with international law is the famous one from Professor Lou Henkin who said that “Almost all countries obey almost all international law almost all the time.” That is far from one hundred percent compliance, but I do not think you could say anything better than that about compliance with domestic law either. States do care about their self-image, about their reputation, about the patterns of communication that they are creating with each other and that means that international law does matter. Not only in democracies, but all countries around the world. So that is my first point, that international law matters.

My second argument is that law is typically a lagging indicator of social phenomena rather than a leading indicator. That is, by the time the world or a particular country gets around to enacting a statute or signing and ratifying a treaty, most of the time the new rule of law has already been well insinuated into the social fabric, and the law therefore reflects the social change rather than prompting the social change.

That should not be a surprise. Law, especially international law, is a crude tool. The mechanisms for generating international law are primitive and underdeveloped. In the

international community we do not have a functioning legislature that can churn out new laws the way a congress does, or the way sometimes a congress does. We do not have an international judiciary system that plays a role in the international society the way that the courts do in the United States. We do not have an international executive branch that plays the role in promulgating new rules the way a well-functioning law system would.

Even when we do generate laws, too often treaties are imprecise and unclear and lack the details that would be necessary, and that is not a surprise. It is very difficult for lawmakers, either in our legislature or in treaty making, to contemplate the wealth of human experience that will have to be governed by these rules. The difficulty of amending and updating the rules is often a frustrating experience. The passage that comes to mind here is from Oliver Wendell Holmes, who observed that “The life of the law has not been logic, it has been experience.” Often, we cannot anticipate the demands that law will be expected to fulfill, either domestically or internationally; rather the law grows organically in response to the derived experience of human beings and law is therefore, more often, a lagging indicator rather than a leading indicator of social experience.

My third point is that the United States is at its strongest, and that it is most effective, when it takes seriously the rhetoric of the respect of the rule of law. Sometimes it may be tempting when a country is a superpower, especially during a period when it is the only superpower, to disregard the trappings of law and pursue national self-interest or to do what seems to be “the right thing” even if it conflicts with the law of the day. Today, however, when we observe changing circumstances, when we see the emergence of China as a near peer competitor and partner and potential adversary, we are reminded even more vividly about the value of having reliable systems of law that are adhered to even by the powerful players, even when their short-run self-interests might drive them in a different direction.

This means we should be paying careful attention to precedent – to the models that we are creating, to the lessons that we are teaching the world by our behavior. There are lots of behaviors around the world that need to be attended to. When the United States supports the use of military force and autonomy for Kosovo, we have to be aware not just what that means in the Kosovo situation but also what are the implications for Russian action in Georgia? When the United States decides to use military force in Libya or in Syria, we have to ask, “What are the implications of that for Russian action in Ukraine?” What is the neutral principle that the United States is modeling for other countries around the world? And the principle cannot be simply “We are the good guys.” We have to be attentive to the perspective that will be brought to bear on these kinds of issues from a variety of different audiences. In the long run, hypocrisy or claims of exceptionalism cannot be a sound basis for international behavior.

Finally, my fourth contention is that despite all these challenges, traditional international law provides an adequate basis for responding to the challenges and can adapt to the variety of changes that we confront.

We do live in an era of dramatic change. We live in an era of technological change where warfare today can include cyber activity, robotics, and biomedical enhancements

that could change the nature of international dealings. We live in a world that is politically very different from that that our predecessors saw in 1945 when drafting the UN Charter. No one would have foreseen the role that non-state actors, terrorist organizations, would come to play in the world today. We live in a period when states, the fundamental building blocks of the international system, are subject to extraordinary pressures of diverse sorts; both pressures to split apart, sort of a fission operation as we may be seeing with Scotland, and at the same time, pressures towards fusion or amalgamation into bigger entities in the pursuit of economic prosperity and security as with the European Union and NATO and others. Finally, we see diverse kinds of national security threats that are non-traditional – that our typical, traditional tools do not equip us well to deal with, such as climate change and pandemic diseases such as Ebola.

But the point for me is that international law, especially here, the law of armed conflict, has adapted successfully to revolutions in military affairs of that sort in the past, and will be able to adapt to similar revolutions that we are encountering today. The core principles: necessity, proportionality, discrimination and avoidance of unnecessary suffering are just as valid today as they were at the time of Grotius and Lieber and Martens, and they can be adapted – they will have to be adapted – to the new circumstances; but that can be done.

In conclusion, what I say about the fog of war is that law is not only relevant, it becomes most relevant in these trying circumstances. It is in times of transition and trauma that we most need to depend upon and adapt the tools of international law.

**Professor Nicholas Rostow**

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Let me begin with the required disclaimer, that the views I am about to express are my own and do not necessarily represent the positions of the U.S. government or any part thereof.

The question I thought to address is the relevancy of the law in armed conflict, in particular, in the fog of war. War is a political act; it is framed by law, however. That in itself does not guarantee that the rule of law will prevail. They are quite different issues actually.

International law governing the use of force, the use *ad bellum*, is rather simple. Under the law, a state is only permitted to use force, individual or collective self-defense, or pursuant to a UN Security Council. That is it; in no other circumstances may a state lawfully use force internationally.

So, the question then becomes, what is individual or collective self-defense? How far does it go? Does it include defense of citizens? Does it include anticipation of an attack? Do you have to wait for Pearl Harbor or if you see the Japanese fleet coming can you intercept it?

The second branch of relevant international law concerns “the laws of war” also known as “the law of armed conflict” or “international humanitarian law.” These are interchangeable names for the same body of law, although I prefer “laws of war” because I think it is more precise. The laws of war govern the conduct of military operations. That body of law governs conduct whether the conflict is international or non-international. And the lawfulness of the initiation of the conflict does not determine whether or not the operations were lawful. So, the fact that Nazi Germany engaged in a law of war of aggression does not mean that every military operation its forces conducted was criminal. Most of them were but not 100 percent, *per se*.

Now the body of law that constitutes the law armed conflict has grown over the years and includes conventions like the four 1949 Geneva Conventions, which are the most adhered to body of law in the international sphere, to the point where they have become customary law, binding on new states without further action. If Scotland becomes a new state, it will be bound by the Geneva Conventions without having to take a separate act, because every state in the world is so bound.

But there are also much more controversial instruments affecting the laws of war, notably Protocol I of 1977 to the 1949 Geneva Conventions, to which the United States is not a party, but to which many of our allies subscribe. By its language, Protocol I would make the use of nuclear weapons illegal and grant combatant status to people who are “farmers by day and fighters by night,” that is, people the United States regards as terrorists not entitled to combatant status. The United States has taken the position that it cannot live with these propositions. But when we have to engage in coalition

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warfare, our allies often are party to Protocol I. So, we have to find practical accommodations, solutions to the problems posed by coalitions of states operating according to different rules.

Now, I thought I would say a word about “necessity” and “proportionality,” which are common law terms and concepts at the heart of customary international law. Customary international law consists of law reflecting the practice of states. States conform to this customary law because they feel legally obliged to do so. Necessity and proportionality are at the center of the law governing the use of force. They are not mechanical terms. They are, in my view, best understood as tests of reasonableness. In other words, the use of force is necessary if there is no reasonable alternative. If you tried everything, you do not have to try it ten times more. You do not have to try and engage your enemy in diplomatic conversations ten times, if any reasonable person would consider it pointless. And proportionality is the amount of force reasonably calculated to bring to an end the condition that gave rise to the right to use force in the first place, and to achieve lawful objectives. It is not tit for tat. If someone shoots you with a bow and arrow and you happen to have a gun, it does not mean you cannot use your gun. Now, to use a nuclear weapon to respond to a bow and arrow is not a good idea. And it would ruin your day too.

A third principle also has become part of the law of military operations: distinction. It concerns the distinction between combatants and non-combatants. I would like to address this issue in connection with targeted killing, and it is a matter of some confusion – both in our own government and in commentaries. First of all, combatant and non-combatant are defined in the 1949 Geneva Conventions. A combatant is allowed to kill. A non-combatant is not. So if you are in an armed force, if you wear a uniform, if you are subject to command, if you carry your arms openly as specified in the Geneva Conventions and you are captured, you are entitled to prisoner of war status. If you do not meet those standards you are not a combatant; you may be a fighter, but you are a criminal. A battlefield is not a tourist destination – though it may be. I remember reading that people in Washington wandered out to Bull Run to see the Civil War fought; though I do not think they quite liked what they saw. The Pentagon and American judges talk about unlawful combatants, but that is really not a useful term, it is not in my view, accurate. You are either a combatant or you are not. And if you are a combatant you are entitled to prisoner of war status upon capture; and if you are not a combatant you are not entitled to that status. It does not mean you have no legal rights, but it means that you can be prosecuted for murder, or an accessory to murder, if it can be proved.

Now, this legal framework leads to the question, “who is a lawful target?” If you are a combatant, you are a lawful target. If you are a military commander, you are a lawful target. If you are the President of the United States, you are a lawful target – Commander in Chief of the Armed Forces, even though the presidency is a civilian position. If you are a lawful target, then you can be killed, and how you are killed does not really matter. You can be sniped at like Admiral Nelson, or nowadays you could use a drone to get Admiral Nelson. You would not bother with a sniper and the rigging of some French ship in the Battle of Trafalgar; just send an unmanned drone. The legal framework for determining a lawful military target is found in the laws of war, that is, international, not domestic law. Due process does not arise. You are not taking away someone’s rights. You are engaged in armed conflict with a legitimate enemy. That is the issue. It is true that the argument is a bit circular: if you are a target, you are a target, you are a target.

As I said in the beginning, the rule of law is not assured simply by having rules. The United States, I believe, has a particular obligation – both constitutional and moral – to advance the rule of law. It is in our interests, and it is required by our constitutional government. And when we run away from it, we get into endless trouble. A good example, I believe, is the detention of people in Guantanamo Bay. That decision reflects a fear of constitutional process and was a big mistake. We have got ourselves in a position we do not know how to get out of it.

Whether law can be a language for the resolution of problems and the enhancement of security, depends as much on whether people agree on what the law is as anything else. Legal reasoning can help. It is a recognized, universal discipline. We should employ it in our diplomacy, and in our public statements. It can bring more understanding of what the law is and thus advance the rule of law. As the rule of law advances, all benefit, even those great powers that prefer to do what they have the power to do.

**Issam Saliba**

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**Part One\***

My participation in this program is personal, and not as a representative of the Library of Congress or any U.S. government institution.

The subject matter of this discussion is the relevancy of the laws of war in light of the hostilities taking place in Syria, Iraq, and elsewhere. During a speech at the Hawaii University School of Law in early 2014, I think it was in February, Justice Scalia made a statement and a prediction. In the statement he said the U.S. Supreme Court ruling in *Korematsu v. United States* is wrong. In the prediction he said “You are kidding yourself if you think the same thing will not happen again.” This same thing that he was referring to was the internment during WWII of tens of thousands of Japanese Americans which the Supreme Court upheld as legal. To buttress his prediction, Justice Scalia invoked the Latin adage attributed to Cicero, *inter arma enim silent leges*, which means in times of war the laws fall silent. The armed conflicts in Syria, Iraq, and many other countries prove Cicero to be right. The laws of war, or armed conflicts, also called international humanitarian law in contra-distinction to international human rights laws, developed overtime, and most comprehensively after WWII.

These laws are divided into three categories known by their fancy Latin names as, *jus ad bellum*, *jus in bello*, and *jus post bellum*. The first category delineates the framework and circumstances under which the initiation of war or use of force is justified. The second category deals with the limitation imposed upon the methods and means used in the prosecution of war or in the use of force. And the third category focuses on issues that postdate the ending of hostilities.

Most of the rules and the principles of the laws of armed conflict have been codified in international treaties and conventions or recognized by courts as a part of the international customary law. Normally these rules apply to international armed conflicts, but some of them apply to internal armed conflicts as well. Common Article 3 of the Geneva Convention explicitly provides, in the case of internal armed conflicts, for the application at a minimum of certain protections to non-combatants, including prohibitions of violence to life and person, prohibition of taking hostages, and prohibition of degrading or humiliating treatment. Any party to an armed conflict must comply with these provisions, irrespective of who initiated the hostilities and how the other parties behaved.

Based on what we know, from the media and other sources, all the parties to the armed conflict in Syria have repeatedly violated these provisions. The death toll in Syria as of 2013, when the United Nations stopped counting, is estimated to have exceeded the one hundred thousand mark, most of which is blamed on the Syrian government. On the other side, notorious cases of killings and kidnappings by the opposition abound. Among them are the killing of the American and British journalists, the kidnapping of

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Christian nuns who were later released after a long time in captivity, and the kidnapping of two Christian Bishops, whose fate is still uncertain.

My focus is on Syria because this is where the group calling itself the Islamic State of Iraq and the Levant known as ISIS or ISIL control a big swath of land and where the United States has apparently decided to engage in war activities under the semantic name of counterterrorism. On September 10, 2014, the U.S. President addressed the nation and the world to outline a four pronged plan to degrade and ultimately destroy ISIL through a comprehensive and ultimately sustained counter-terrorism strategy. He correctly described ISIL as a cancer to be eradicated, and its actions in taking the lives of two Americans, as acts of barbarism. In the second prong of his strategy the president said we have ramped up our military assistance to the Syrian opposition and called on Congress to give his administration additional authority and resources to train and equip these fighters.

Standing up and destroying ISIL is certainly a noble cause, it is admirable, and is a legitimate act in protecting the security of our homeland. Equally admirable is the standing up to dictators and tyrannical governments; but accomplishing that through the training and arming of rebel fighters is a violation of international humanitarian law. The Kellogg-Briand Pact of 1928 explicitly condemns and renounces the recourse to war as an instrument of national policy. The Charter of the United Nations further requires in Article 2(4) that all member countries refrain from the threat or use of force against other states. Training and arming rebel fighters to undermine the government of a member state, involves the threat and use of force as confirmed by the International Court of Justice in the ruling in *Nicaragua v. the United States of America*, and is therefore against international law.

The armed conflict we are witnessing in Syria started as a legitimate uprising against tyranny, against oppression, and against abuse of human rights. But it was taken over by groups who believe they are enforcers of the divine word of God. These groups, and other similar groups in Iraq, Yemen, Somalia, Libya, Nigeria, Mali, and many other places are the product of a distorted teaching of the noble religion of Islam. A teaching that rejects the other, espouses violence, and treats terrorism as a sure ticket to paradise.

Defeating these terrorists by military force alone is impossible. In 2001, we had al-Qa'ida plotting against us from the dark caves of Tora Bora. Thirteen years later with trillions of dollars spent and thousands of our brave soldiers dead or injured, we ended up with a worse version of al-Qa'ida operating in the bright light of day from the birthplace of civilization. Our failure to effectively face terrorism is not caused by deficiencies or insufficiencies in existing laws and regulations. In fact, I believe we have too much of both. Defeating ISIL and its likes is a complex endeavor that requires our intellectual resolve to confront the religious component of their ideology and the might of our military to face down their fighters on the ground. Our military leaders and their personnel have done their part brilliantly; we as a nation are still lagging far behind.

## Part Two\*

I should note that I am here in a personal capacity. Opinions I express and statements I make are strictly mine and shall not be attributed to the Library of Congress or any other U.S. government institution.

I am going to speak only about one issue, and that is whether terrorism can be treated as an international crime – like war crimes, genocide, and crimes against humanity. In 1937, the League of Nations adopted the first multilateral convention for the prevention and punishment of terrorism. Article 1 of that convention defines acts of terrorism as “criminal acts directed against a state or intended to create a state of terror in the minds of particular persons, or a group of persons, or the general public.” Now this convention has not been ratified and never entered into force. Attempts to adopt a substitute treaty have been frustrated since. The United Nations member states are still unable, for several years now, to move forward on the draft Comprehensive Terrorism Convention which requires acts of terrorism to be intended, like the first convention, to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Now, the main stumbling block, why the world community is not able to agree on a convention, is the problem of defining what terrorism is. This is despite the existence of many definitions crafted by distinguished scholars in the field, including one by Professor Yonah Alexander, I do not know if you saw it on the internet. Unless we can define terrorism in terms of a criminal law language, there is no way that we can treat terrorism as an international crime. In *United States v. Yousef*, the United States Court of Appeal, Second Circuit ruled in 2003 that terrorism is not an international crime that can give rise to universal jurisdiction. Why? Because there is no international consensus on the definition of terrorism or even its proscription.

Yet a minority view exists to the effect that terrorism has already been defined by international customary law. In an article published about a decade ago the late Antonio Cassese, a distinguished professor of international law at the time, wrote, “Contrary to what many believe, a generally accepted definition of terrorism as an international crime in times of peace does exist.” And still I am quoting him, “This definition has evolved in the international community at the level of customary law.” Now more recently, in 2011, about six or seven years after he wrote that, the Special Tribunal for Lebanon, or STL, a mixed tribunal established to prosecute a local crime under Lebanese Law, issued an opinion in which it concludes that a customary rule of international law regarding the international crime of terrorism, at least in times of peace, has indeed emerged. This pronouncement is exactly or pretty much concordant with Professor Cassese’s opinion, and there should be no surprise there. Why? Because by that time Professor Cassese had become the President of the STL and acted as the Judge Rapporteur who drafted the STL opinion. In describing what constitutes the international crime of terrorism, the STL identified the following three elements: One, a perpetration of a criminal act, or threatening such an act. Two, the intent to spread fear among the population, or directly or indirectly coerce a national or international authority to take some action or to refrain from taking it. And three, the act involves a transnational element. In other words, in

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order for terrorism to be an international crime it has to be transnational; national terrorism would be excluded under the STL definition. And I do not know whether under this definition ISIS indiscriminate killing and murdering of innocent people could be described as international crimes of terrorism. If we were to take the STL opinion at its face value, the crime of terrorism should be an international crime, and would be by now working its way to being included within the jurisdiction of the International Criminal Court, along with the crimes against humanity, genocide, war crimes, and the newly added crime of aggression. A member of the Department of International Law at the Military Advocate General Corps of the Israeli Defense Force cites the opinion of the STL to argue for the prosecuting of terrorists before the International Criminal Court.

Despite the STL opinion, we are still, I think, very far from being able to use the international criminal law as an effective tool in the fight against terrorism or claim terrorism as an international crime under international customary law.

First, it is reasonable to suggest that a rule outlawing all acts of terrorism has emerged under international customary law, because the many specific anti-terrorism treaties, such as the International Convention Against the Taking of Hostages, the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, and another 12 or 13 similar conventions, and also because of the plethora of U.N. resolutions and pronouncements requiring states to take certain specific actions in matters related to terrorism. But such a rule outlawing terrorism is not sufficient of and by itself to make terrorism an international crime. As Kai Ambos, Chair of International Criminal Law at the George August University in Germany, and Anina Timmermann explained in their comments on the STL opinion, “while it is difficult to disagree with the chamber,” meaning the appellate chamber of the STL Tribunal, “as to a (*primary*) customary rule outlawing terrorism and the ensuing obligation of states in its preventions and repression, it is a different matter to infer from this prohibition, without further ado, the existence of a *secondary* rule in the form of an international crime of terrorism.”

Second, it is counter intuitive to assert that an international customary rule defining terrorism has emerged while the United Nations has not been able to agree on what terrorism is. And if we go to the various pronouncements and treaties that have been adopted by the United Nations, we find different definitions, even now. I just would give an example, in the Declaration on Measures to Eliminate International Terrorism adopted in 1994, the General Assembly defines terrorism as criminal acts intended or calculated to provoke a state of terror in the general public for political reasons or political purposes. Now the International Convention for the Suppression of the Financing of Terrorism defines it as acts intended to cause death or serious bodily injury to a civilian or any other person not involved in war, when the purpose of such act by its nature or context is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act.

Now we can notice that these two definitions differ from each other and from the definition offered by the STL notwithstanding the existence of some elements that are common among all of these definitions.

Third, regardless of what definition is adopted or agreed upon on what terrorism is, the word terrorism and the meaning of the crime appears to be evolving and changing

at a rapid pace. I wonder, for example, whether any of the definitions we mentioned would be able to capture all the acts that the civilized world today considers to be acts of terrorism. For example, let us take the killing of Christians and Yazidis who refused to convert or pay the *jizya* as demanded by ISIS or ISIL. Would such killings be covered in any of the foregoing definition if the real motive behind the killing was a distorted belief of the killers that their action is required by the command of God? Would any of these definitions capture such crimes if the intention of the killers was truly a belief that they are carrying the dictates of their religious belief and not to influence a foreign government or to spread fear among the population?

Let me close by asking a challenging, rather than a rhetorical, question, and this has nothing really to do with the law: are we really determined to fight terrorism as one of the most serious crimes of our time, no matter where, by whom, and for what purpose, it is committed? The evidence is less than clear on this point. In a recent speech at Harvard University, the U.S. Vice President revealed that Washington's biggest problem in fighting ISIS and other terrorist groups in the Middle East is not the rebels fighting in Syria and Iraq but rather the United States' allies in the region. He named three countries as being so determined to take down Assad that they started a proxy Sunni-Shi'a war, supplying cash to those fighting the Syrian president. Now this candid revelation by the vice president, who is known to be candid, raises another question. Could three of our closest allies in the Middle East supply terrorist groups with cash and probably other material support without our tacit approval?

**Professor Paul R. Pillar**

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I come at this from the perspective of a counter-terrorist consumer who is not himself a lawyer. I worked on that topic for a number of years in government service and I have looked at it from more of an academic perspective as of late. I have not recently been a consumer of legal advice, as I was when I worked in government service, but I still appreciate a good clear legal position on the issue. I want to put out as my main point that there is a challenge and a problem, an inconsistency as I see it, in which we collectively – and this is a broad “we” – have drawn on peace time and war time legal frameworks as ways to think about terrorism and counterterrorism. Each one of those frameworks is quite internally consistent and has served us well in many other contexts other than terrorism. The problem is we have wound up selectively picking from one or the other in a way that, I think, overall has not been consistent. And I do not blame lawyers for that. I think the problem began with the application of the war metaphor to counterterrorism, specifically in the immediate aftermath of 9/11, for reasons other than legal reasons. The “we are at war” cry served other purposes when the lawyers were not consulted.

One, it is simply an exhortation. An expression of the importance of the topic, that “we need to do more,” and so forth. Secondly, it became a kind of code word for those who wanted to express a preference for using the military instrument in the name of counterterrorism more so than other instruments, diplomatic, financial, and so on. You even heard people, especially in the immediate wake of 9/11, throw out a false syllogism saying, “this is an important problem right? That means we are at war. If we are at war that means using military force, right?” Well the logic does not actually quite flow but that is the way a lot of the thinking went. The real lawyers have had, I think, a mess to clean up.

We Americans have had, traditionally, more so I think than other people, a feeling that there are clear distinctions between time of war and time of peace. It is part of our broader black and white thinking that other people are not as necessarily prone to as much. I do not want to go into the whole background of that. But the distinctions, when it comes to terrorism, are not nearly as clear as we Americans like to think and the proclamation that “we are at war” after 9/11 really does not take into account some of the blurriness in the distinctions.

A pertinent observation is that if you look at what terrorism is, and how it has been defined, both by scholars who have followed it and even in some of our official United States government definitions, some of the most inherent aspects of terrorism involve violations of the laws of war, in at least a couple respects. One is that terrorists do not wear uniforms and insignia in a way in which an armed force under the laws of war is supposed to be clearly identified as a military force; stealth is instead the usual method. Another obvious respect is attacking civilians, which gets right to the essence of terrorism. In fact, some of our United States government definitions talk about attacking non-combatants, which are not always civilians, but it gets to the idea that this is something

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different from battle waged between uniformed forces on a battlefield. So terrorists attack civilians which is a violation of the law of war. The fact that others violate the laws of war is of course not reason for us to violate them, and we do not, not intentionally, but I think that our picking and choosing of peace time and war time frameworks does raise some legitimate questions.

We have referred to a war time legal framework to justify many of the things that we do including, but not limited to, use of military force, but we have not gone fully in that direction. People we capture on battlefields and other places, in Afghanistan and elsewhere, we have not called prisoners of war, as they would be defined under the laws of war. We call them something else—illegal combatants. So we are still in the netherworld between peace time and war time.

I think major aspects of the current international terrorist threat, especially as it has evolved in recent years since 9/11, takes us farther and farther away from the types of armed conflicts and confrontations to which traditional law of war most clearly applies.

Let me mention three respects in which that is true. One is the indefinite and ill-defined nature of the entities or organizations that we are combating. In the immediate aftermath of 9/11 at least it made some sense for those who said, “Well we are at war with al-Qa’ida, the group that did 9/11 and a few other attacks against us.” And that made more sense than a “war on terror;” at least there was a specific entity we were fighting. But since then al-Qa’ida itself has metamorphosed into something much vaguer, harder to delimit in terms of what kind of organization it is. We still have al-Qa’ida Central in South Asia, the guys hiding out with Zawahiri somewhere along the Durand Line. But they are actually not the main threat these days. It is more of the so-called affiliates in places like North Africa and Middle East and elsewhere. Some of those, but not all of those, have adopted the al-Qa’ida name. The name does not really tell you whether it is part of a larger organization or not. Then you have all of the onesies and twosies and threesies in cells in the west and so on with individuals who express varying degrees of affiliation to, or allegiance to, or admiration for an organization like al-Qa’ida. Now we have got ISIS, or Islamic State, which started out as one of those affiliates of al-Qa’ida, and then broke with it. And now we have got other sorts of entities including those onesies and twosies and threesies on various continents that express various degrees of affiliation to ISIS.

How do you make sense of this in applying a legal framework that was devised with much clearer entities in mind, such as when we were making war against Germany or Japan? Or even in the case of internal conflicts, against a specific guerilla or insurgent movement, the adversary is a lot better defined, even though it is not a nation state, than the sort of thing I am talking about. So that is indefinite organizations.

Secondly, indefinite geographic limits. We are talking about a phenomenon we are combating that ranges across the world and blurs the distinction between domestic and international realms. That fact has been one of the big problems when we get into some specifics, one or two of which I will mention in just a moment.

Finally there is not a limit in terms of time. Again, especially here in the United States, we think there is a clear distinction between war time and peace time, even though we do not declare war in Congress these days anymore. We have certain specific

beginnings to wars; there was a particular date, for example, when we began the war in Iraq in 2003. And we speak about how a lot of the problems of handling terrorists involve what we are doing for the duration – for as long as we are combating terrorism, or as long as we are waging a so called war on terror. But as even some of our leaders such as former Secretary of Defense Donald Rumsfeld have told us, we are not going to have a clear ending. My argument is we do not have an ending at all. Terrorism has been around for millennia, and so will counterterrorism. But even in the sense of counterterrorism as being a major United States policy preoccupation, we are not going to have anywhere near a clear ending. So what does that mean in terms of any kind of shift between war time and peace time legal frameworks?

Thus, we have got a series of problems that I think are still unresolved. Just to name several, and I am sure we will have more discussion on this, one concerns congressional Authorization for Use of Military Force (AUMF). I think it was good that the administration sent a draft to Congress a few months back. And I agree with those who say that the old resolutions, the one right after 9/11 and one before the Iraq War, really do not carry the freight in terms of what we are doing regarding military force and counterterrorism. But Congress seems most recently to have given up on this. Members are concerning themselves with the Iranian nuclear issue, but the last reports I have seen indicate that AUMF is just not going anywhere. We can think of political reasons for this but I think the main reason is it is hard to come up with a resolution that would really get around all of those problems I have described. It is difficult to come up with a formula that would authorize the president to do what he needs to do to combat terrorism but would place meaningful limits on what he does. So that is one problem.

A second problem concerns Guantanamo, and I share admiration for the president for trying to do something about this. He pledged to close it in a year, he was not able to meet that pledge, and of course we are way beyond that time limit. I think part of the reason why it would be good to close Guantanamo is not just the overall image it has but also a reason that gets back to the issue of the rule of law. Ask yourself, “Why was that particular location chosen for this detention facility?” Was it to give the detainees the cooling effect of Caribbean Sea breezes? No, of course not. It was chosen as this *sui generis* spot, a military base under a long-term lease in a country headed by a government that we do not even have diplomatic relations with (although we might soon), and the idea seemed to be to keep it out of the reach of anyone’s law – U.S. law, Cuban law, or anyone's law. That is not a very good statement about counterterrorism and the rule of the law.

Another problem related to Guantanamo concerns military tribunals. I would assert, as we look at the shakiness with which that institution has tried to come into operation, that creation of the tribunals was for many people a matter of making, to put it quite bluntly, an ideological point that we are at war when it comes to counterterrorism. As a practical matter, relying as we have for many, many years on the Article III civilian courts, especially those that are most experienced in dealing with terrorism cases like the Southern District of New York, where our new Attorney General comes from, I see no reason why the tribunals had to be created in the first place and why those other courts, which have served us well, could not serve us in this case.

Another problem area is surveillance and intelligence collection. Here I would just point out that the main reason for all of these controversies we have heard with regard

to the NSA activities and so on is the previously mentioned blurring of what is domestic and what is international. Here we are getting into the technological fact of how a lot of the stuff the NSA would usefully collect, in terms of foreign terrorist communication, flows through switches or cables or whatever here in the United States. That is how we got into this whole business of what is considered domestic collection.

Finally I would mention, as a particularly sticky point, the issue of extra-territorial execution, if you will, of people and specifically United States citizens. I think what particularly puts this into a very disturbing framework is the most recent case of an American citizen who reportedly was on one of these hit lists, or he was at least the target of a lot of discussion within government circles as to whether he ought be the target of a drone strike when he was still off in South Asia or wherever he was. But then he was captured and now he is in United States custody and he is being brought to trial in a United States court. That greatly weakens, of course, one of the rationales for the extra-judicial execution of an American citizen, which is that we have no other way of reaching them and we cannot bring them into a court. I think this is a very disturbing issue and we are not close to a solution.

So my overall conclusion is that we have expected too much from the lawyers, who have done as well as they can in trying to maintain the consistency of peace time and war time legal frameworks. It is we as the public who have imposed unclear and inconsistent rhetorical, political, and even at times intellectual frameworks that have resulted in these.

**Ifat Reshef**

*Minister for Middle Eastern and Counter-Terrorism Affairs, Embassy of Israel\**

I am here to share a little bit of our experiences, the State of Israel. I have to say from the start that I will offer more dilemmas than answers. We simply do not have good answers for what is one of the toughest and most difficult situations for decision makers anywhere and in the State of Israel in particular. Also, another opening remark, is that I will not be discussing ISIL. Although, unfortunately we find ourselves in the situation now that we border with both the affiliates of ISIL and al-Qa'ida. But we still have bigger threats and greater problems that we face from those terrorist organizations that have been targeting Israel for decades now; mostly Palestinian and Lebanese terrorist organizations. The most famous Lebanese terrorist organization that is also the most famous proxy of Iran is off course Hizballah. This is an ongoing challenge, an ongoing experience, and one that has gone through different phases. And I think it is fair to say that we are still in the midst of the learning curve and while we have reached several conclusions, this is probably not the end of this process unfortunately.

But, I would like to begin first of all with the understanding that we in Israel face a unique aspect of the phenomenon of kidnapping for ransom. Which is to say we are mostly faced by a ransom demand to release prisoners, to release terrorists. This is not kidnapping for ransom to pay money. So the families of the people who are kidnapped, be they soldiers or citizens, are not faced with this dilemma about whether to pay out of pocket or to get the money in another way. So, this is an issue that the state needs to deal with, and I also believe that the understanding in Israel is that this is a responsibility of the state to deal with these issues. The families can do a lot in terms of public relations campaign, in terms of making this issue remain very much in the news, but it is not in their capability to do whatever is needed to release their loved ones. So this is an important remark which is unique to our situation.

I would also like to give a little bit of background in saying that the whole issue of kidnapping for ransom is actually a very old one in our tradition, or at least the tradition of the Jewish people, because it not only has roots in the Bible but this is one of the most important commandments (releasing a member of the community that has been kidnapped or unjustly arrested) that you have in the Jewish religion and it was extensively debated in the Rabbinical literature, both Mishnah and the Talmud. Because it not only it referred to a phenomena that was going on – Jewish communities were facing situations where people became hostage, kidnapped, or put in jail by hostile authorities in order to pressure the community to pay ransom. The reason for that was not just the fact that they were very vulnerable in different places and under different circumstances but because there was such a commandment that was considered much more important than other commandments which dealt with helping the poor, helping the weak. Also, the sense of solidarity, mutual solidarity within the Jewish communities that was very well-known to their surroundings. We are having discussions that go back almost 2,000 years ago.

What is fascinating is that the same questions and the same dilemmas that we face today were already discussed by our sages, by our most important rabbis from those

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years. And the questions are mostly how do you weigh the life of a person, the life of an individual, and the better good of the whole community? How do you put value on human life? Could it even be possible? And if you are willing to give everything you have – and the ransom back then was indeed mostly money – if the community is ready to get the necessary funding and to pay the ransom, would that not be counterproductive because it would just bring about the next incident where a person from the community would be abducted, kidnapped, and so on and so forth.

So these dilemmas are very ancient in our history and the dilemmas continue. The answers, I am afraid, have not been very successful. Answers have been given, by the way. One attempt was to say that you can pay ten times the fair value of a hostage. Now again you can ask who is to say what is the fair value of a human being? How can you even presume to say that? But apparently people did come up with rules for how to do that. But I have to say even those rules were not exactly maintained; there were exceptions. For example, in the case for a husband and wife, the husband has the duty to pay everything he has to release his wife, at least for the first time. In the case of important Jewish scholars, for example, some of the rabbis again thought that there are no limits to what you need to pay because the value of these people to the community is much higher and so on and so forth. This is to say that strict rules were never really kept. There were attempts to create some kind of logic for how should the community operate but the reality was always stronger than those attempted rules.

If we move now to our times, the modern State of Israel, we will find that the nature of the demands have changed and today they include mostly the release of prisoners, the release of terrorists. That adds another set of complications and dilemmas to our decision-makers because again it is mostly a question of motivation. It is a question of “If you do pay this price, what will happen next? Wouldn’t that just encourage the next abduction, hostage-taking, or kidnapping?” We also have to take into consideration that those people who are released, those terrorists, they themselves have the potential that in a lot of cases has indeed been fulfilled in a very short period of time to go back and engage in terrorism.

So the dilemma that a decision-maker in Israel is facing is again how do you weigh life against life? If there is a person (or persons), a soldier or a citizen, who has been kidnapped, they have a face, they have a name, they have parents, they have family, they have friends and we are a very small country. Everybody knows everybody. But at the same time you are asked to release arch-terrorists that once released will probably go back to terrorism and then they might kill an indefinite number of people who you still do not know their identities, and their faces, and their families. And when it happens – and it has just recently happened in the past few months with six Israelis killed as a result of terrorist activities in which some of the people who were released during our last prisoners deal we made with Hamas, the Gilad Shalit deal, have been involved in different levels - this raises huge dilemmas for the Israeli society and a huge dilemma for the government. So these are questions that are very, very difficult to answer and there are no good answers. You can think of pros and cons for every path you might choose to answer it and this is an ongoing effort that we are still very much in the midst of.

One of the famous Israeli experts on this issue, Dr. Boaz Ganor, suggested, for example, that there have been changes in the way the terrorist organizations conducted

their kidnapping activities as a result of the way that the government of Israel chose to react to them. So there is a significant difference between those kidnapping attacks that went on in the 1970s compared to the ones we experienced since the 1980s to today. The main difference is that in the 1970s you would have these incidents where there would be a takeover of a facility. It could have been a school, a bus, a house, a known facility and the terrorists would take hostages and then they would start making their demands and the bargaining “yes or no” would start. That allowed for situations where instead of actually starting negotiations to release the hostages, the government of Israel chose when it was possible to try a military option, a military takeover, and taking-down the terrorists and releasing the hostages without paying the ransom, and not yielding to terrorism. And that in fact was the policy that was put forward in the 1970s by the late then Prime Minister Rabin. Whenever there is a possibility to try and militarily take-down the terrorists and release the hostages, you do not negotiate. You do not start the negotiations. However, the second part of it was that when this possibility does not exist, you do in fact start negotiations and you try to see which of their demands you are able to answer. And the reason is you cannot just leave people in this situation and abandon them. So we never really had a policy of no negotiations because that would have been, I believe, for the Israeli society, almost unbearable.

One of the reasons that we have to take into consideration is that we had different cases of hostage-taking – from school children, families, what have you – but there has also been a tendency, a growing tendency I am afraid, of kidnapping soldiers. And while we share with most of the countries in the world this notion that there is a duty, there is a commitment by states to their citizens and states need to do their best to protect the lives and well-being of their citizens, in the case of soldiers there is an additional commitment when it comes to the State of Israel, because we have conscription, we have a general drafting. Boys and girls, primarily from the Jewish population in Israel, when they turn 18, go to the army. They go to the army, they enlist, which means that their country sends them to protect her and if they are taken hostage or kidnapped when doing so, the state has an additional duty to get them back. This is part of what was mentioned with respect to the U.S. You do not leave a wounded soldier behind, you do not leave soldiers behind. And it is a very strong notion in Israel and some would argue it is more than a contract that the State of Israel has with its soldiers; that it is a contract that State of Israel has with the parents of the soldiers, the former generation. Because if mothers and fathers in the State of Israel are expected to send their kids at the age of 18, they also expect from the State of Israel to do its best to make sure that if there is a possibility for them to come back home this is what the state would do.

So what happened in the 1980s was that the different terrorist organizations realized that the government prefers to do everything possible in order to not conduct negotiations and actively trying to release hostages – at a terrible price by the way. We had cases when both hostages and the soldiers who participated in their attempted release were killed. I am sure you are all aware of the very famous Entebbe case where we had an Air France airplane that was abducted to Uganda and only the Israeli hostages remained at the airport there. There was a very heroic release attempt that actually most of the hostages got back safe and sound; there was a lady who was hospitalized then and she died. But we suffered losses and the most famous one was in fact Yoni Netanyahu, the brother of our prime minister who died during this operation.

So in the 1980s we saw a change in the strategy and tactics of the terrorist organizations. They understood that as long as they operate in a known place there would be some attempt to forcibly release the hostages. So what they tried to do from then onwards was actually to kidnap an Israeli citizen, be it a soldier or a citizen, and take him somewhere unknown, preferably outside the State of Israel, where it would be very difficult for the IDF and the security organizations to find him. And that actually leaves the state no other choice but to start negotiations.

Even if there is a moral and religious commitment to bring our citizens and soldiers back home, there started to be what people see as a slippery slope, with some very famous deals we had. You could see a new trajectory, where the price is getting higher and higher each time. The ratio between the number of hostages or the kidnapped people that have been released and the number of prisoners that were released by Israel to secure it became bigger and bigger. In fact, in the last thirty years or so, we release more than 7,000 people and got 16 people back. So the ratio is something like 450 to one but in fact, in some of those deals, for example the last deal, Gilad Shalit deal, we even had 1,027 people released in order to get one soldier back.

Now, there was a lot of criticism inside Israel against the deal, about the ratio, about this slippery slope. But having said that, you also need to know that for each of these deals, with all the criticism, there was a lot of popular support. I think in the case of Gilad Shalit there was a poll says something like 80 percent support, and each deal was ultimately applauded by the society because no one could resist the picture of a young soldier going back to his father and mother. It is simply the plain human reaction. So we have the very rational and logical analysis of the State of Israel and then you have the emotional and personal reaction where people are thinking of their own sons or daughters when they go to the army, you cannot compare between the two; it is a heart-breaking issue. We had families of victims of terrorism that tried to protest. Again, for the decision-makers, this is a very difficult choice to make.

I should add, and this is something that is also unique I believe to the State of Israel, that there is another thing we should consider when releasing prisoners in order to get kidnapped persons back home. This is not just that you are encouraging or creating motivation or incentive for the next kidnapping or hostage taking, not just that you are releasing terrorists who when in jail, our experience shows that they only get more radicalized and more experienced. They get operational training from other comrades and they become much more dangerous. When they are released they become a role model for young people in their community. Their release actually helps recruit new members to that terrorist organization. There is a whole myth that is created around them and it has an impact that is much more than releasing one individual or a thousand. An interesting question is what does it do to the deterrence of the State of Israel against its different enemies?

The problem is that hostage taking, like other terrorist actions, is in large part conducting an asymmetric war. In an asymmetric war you have one side that does not adhere to any accepted rule of international law, and in fact is playing against the rules, or tries to bend the rules. This is a way of getting more. We, as a country that defends itself from different threats, need to deter our enemies from continuing this path. There are a lot of questions in Israel whether when the state accepts a deal and when we release 1,000 people for one person, does that in fact hurt and curtail our deterrence

because there are a lot of non-state actors and organizations active in our region. They are all watching. They are all drawing their conclusions and the question is whether their conclusion is: "Look, this is a society that is so sensitive to the life of one individual, so we should try to carry out our own actions or our own hostage taking and maybe get more or in order to make Israel do or refrain from doing something."

In fact, Hassan Nasrallah, the leader of Hizballah, likes to talk about the fragile society of Israel and compares us to all kinds of non-flattering descriptions. But I could also argue and I think that this is something that a lot of people in Israel agree with, that this is actually a sign of strength of the society. That if a society is willing to take such big risks and knowingly release arch-terrorists and the bloodiest murderers you can think of, who killed children and babies knowingly and intentionally, from prisons, to get one of its own back, this is a sign of strength. This is a sign of solidarity, this is a sign of commitment and this actually makes the society stronger. When a society is stronger, the country is stronger. With all of the vulnerabilities this creates, I cannot answer one way or the other. This is an ongoing debate.

I should say though that there have been some attempts over the last few years or so to try and set new rules, ones that would in a way limit the discretion of the government and of the prime minister when deciding on such sensitive and complicated cases. We are all hoping that we would not have to face this situation again. I should add that these types of kidnappings or episodes that we have been experiencing since the 1980s usually take a few years to resolve, because it is so complicated to conduct these kind of negotiations. This is not an episode of days or hours as was the case when the hostage taking took place inside Israel itself; people can be in captivity for years. Gilad Shalit was in captivity for five years of his life and while this is going on the family is going through unspeakable misery. The society, those people who know them and those people who get closer to them during the process, they are all going through a very emotional and very painful situation and this is something that is very much present in the daily life in Israel while it is taking place. Every few years we go through such an episode so we are hoping not to reach a new one.

There was an attempt to set new rules. The attempt started actually before Gilad Shalit was released. The minister of defense set a committee, chaired by Meir Shamgar, former Chief Justice of our Supreme Court of Justice. This committee was charged with coming up with new rules not just with regard to the price but in fact all the relevant questions: not just who should be the one negotiating but who should be responsible for conducting the negotiations and what would be the limitations and so and so forth. The idea, the decision from the very start was that this will not have an effect on the Shalit deal because this was an ongoing case and people did not want to risk it. Their conclusions came a short while after Shalit returned to Israel and the conclusions were submitted to the minister of defense and they are binding and confidential. The reason they are confidential is that we do not want our enemies to understand what they are dealing with. If they have the manual it would just make it easier for them to come up with the most efficient way for them to apply it in the next incident.

A lot of people presume that the idea is to limit the price and arrive at a much more reasonable ratio. So you would still have room for maneuvering for the government to conduct the negotiation. You will never reach a situation where a person is taken hos-

tage and the country just says “I am sorry, I cannot negotiate.” This would be unacceptable in Israel; but the government could not be extorted in the way it has been in recent years by the terrorist organizations that confront us because they know there is no limit on the numbers. I should mention here that we were asked and we paid a price also for getting some idea on the medical condition of kidnapped soldiers, if they are alive or dead. We were asked to pay for corpses, for dead soldiers and for the remains of corpses. There is no limit to the cynical use of this kind of extortion and people did feel that this was creating a slippery slope.

Naturally, I cannot discuss ongoing cases, but I will say that this was a serious attempt to lay down rules. Other attempts that were made more public included some legislation that was introduced that also limits the authorities. Before that it was the president’s authority to pardon prisoners that were sentenced for life. That would be most of the terrorists that murdered people but also some other heinous criminals. It is not just about terrorists; it is about murders of this kind at large. This created a situation where, and again hopefully we will not be in these circumstances again, that the next time might be conducted differently and would be a different experience also for the government. Mainly, the minister of defense is now getting more powers and authorities in the new set of rules, to conduct these cases in a way that might be more reasonable in the eye of the society and the government.

Again, I have to stress that there are no easy answers. Nobody knows how that would actually work in reality. This is an ongoing dilemma because it is a dilemma that cannot be solved. When human lives are put one against the other, nobody can say that the answer is A or B.

**Dr. Harlan K. Ullman**

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I think one of the greatest dangers posed to us by Usama bin Laden and al-Qa'ida is not so much physical threats to American citizens, other citizens, but the threat to the Constitution. What al-Qa'ida has done through terrorism has highlighted the tensions between protecting civil liberties and protecting the nation. And we do not have a good response. What you see at Guantanamo Bay is a question of whether these captured individuals should be treated as criminals or as enemy combatants. We have not resolved that one way or the other. You see these dilemmas in the National Security Agency. How far can they go in trying to protect the nation and yet violate civil liberties? This is ongoing and it is going to get a lot worse. And it is something that we tend to ignore at our peril.

Second, the best armies, navies, air forces, and marine corps are incapable of defeating an ideological enemy that has no army, navy, air force, let alone a marine corps. We see that in Afghanistan, we see that in Iraq, and we see that with the Islamic State.

The third point is that while we talk about resolving these things with a comprehensive approach, how many of you have not heard the term comprehensive approach or all aspects of government? Not just the Department of Defense, but because the Department of Defense is the best resourced, best organized, most functional agency in the U.S. government of its size, by default it takes on all of these issues, and it cannot do that. It cannot solve the terrorism problem unless you get to the roots of the terrorism problem, which are a combination of ideology and physical need. Whether deprivation or psychological satisfaction, you are not going to be able to deal with it. And we have not been very capable because our government system, the way it is organized right now, is not organized for this very, very massive comprehensive detailed series of dangers. We are still very much more comfortably oriented on the Cold War and a kind of bilateralism with a huge enemy such as the Soviet Union or Nazi Germany, and we have to change our mindset. I have been arguing for a brains based approach to strategy for a very, very, very long time and perhaps as Beethoven who was deaf said, "I shall hear in heaven," and perhaps I shall hear in heaven.

Let me talk about a couple of challenges you may not have considered about terrorism and hostages. First, cyber-crime. Anybody not aware of cyber-crime? Anybody not read the headlines the other day about this combination of Ukrainian, Russian, and American cyber thieves who stole 100 million dollars by getting data? Well I have got news for you. That is only going to get even better and better. Because, what happens when I get into the records of companies and let us say I want to bet the stock market. Let us say that I want to bet that the price of a share goes up or down and I can manipulate that data. Now, I am a twelve-year-old terrorist and living somewhere in Ramadi and I have access to the internet. What is going to prevent me or my colleagues from making huge amounts of money by cyber-crime and by leveraging these things? It is happening today and tomorrow and it is going to get a lot worse. This will be the next step for terrorism.

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\* Presentation at an event on "Terrorism Captives: Tactical, Legal, and Strategic Implications" held on August 13, 2015 at the International Law Institute.

The annex to that is cyber blackmail. Supposing I am a member of the Islamic State and I decide I am going to threaten Pepco because I can shut down the electrical power grid in Northern Virginia and in Washington, D.C. What happens if I am with Pepco and I get a threat that I know is valid from the terrorists and they want one hundred million dollars or two hundred million dollars, what do I do? And by the way, they just happened to shut down part of my power grid.

Now, this goes even a step further because I believe that the Islamic State is going to be conducting cyber blackmail against individuals. Now, let me give you a great case; this is not the Islamic State but is a bunch of cyber thieves. A very, very, very rich woman, hugely rich, her personal assistant got an email from this lady saying "Would you please send \$250,000 to Sotheby's because I just bought A, B, C, and D." And by coincidence this assistant happened to run into this lady and said, "I am going to take care of the Sotheby's deal." And the woman said, "What deal?" And what happened was that these cyber thugs were able to get into these email accounts and were able to forge this woman's way of speaking and had all sorts of access. Now what happens when the Islamic State gets desperate for dollars and decides it is going to commit this kind of blackmail? It is going to call up family A, B, C, and D and say unless you do the following we will kill your relatives, we will kill your family, we will do whatever we will do. These are things for which we will have to prepare.

The final point that I will make about hostages, what happens, heaven forbid, when the first American service person is captured by the Islamic State? And worse, supposing it is a woman, and supposing they have three or four or five or ten American service captives. Now are they going to say we are going to crucify them one at a time and show that on YouTube, and what is the response liable to be, and how are we going to react to that? Or are they going to say we have captured ten of your servicemen and we will sell them back to you for a 100 million dollars a copy and every hour or every 24 hours we are going to execute one in the most vile ways? What does the president of the United States do?

Now, this may never happen, this may be the fixture of Hollywood and movies, but it is something that we have to think about. And the problem of thinking about it is that we have such a divided government and such animosity between both parties that even if a president, irrespective of party, were to assemble members of Congress and say look, here are four or five what-ifs we have to think about, and if any of these what-ifs transpire we have to be able to have a nonpartisan way of responding. Can you imagine what happens if the next president is faced with this, where there is an American serviceperson hostage, and now the president says we have to do A, B, C, and D? Whether Republican or Democrat, I can guarantee you that the other party is going to say you are the worst most cowardly president in the world, defeating whatever policies the president may have.

Now, there are solutions, but those solutions require a mature, responsible government. What I argue in my book *A Handful of Bullets: How the Murder of Archduke Franz Ferdinand Still Menaces the Peace*, is that arising from that war that started a hundred and one years ago, four new horsemen of the apocalypse were created. The first and most dangerous is failed and failing government. We see it here in Washington, we certainly see it in Afghanistan, we see it in Syria, and we see it virtually around the world. How do you deal with that? The second is economic despair, disparity, and dislocation.

Similarly, these have global consequences. Religious ideological extremism, that is what we are talking about; and environmental calamity. These are the greatest dangers. But, the biggest danger right now when we are dealing with this issue of hostages and terror is how do we make a broken government work under these circumstances? I will leave you with the answers to find out how we should do that.

# Academic Centers

## Inter-University Center for Terrorism Studies (IUCTS)

Established in 1994, the activities of IUCTS are guided by an International Research Council that offers recommendations for study on different aspects of terrorism, both conventional and unconventional. IUCTS is cooperating academically with universities and think tanks in over 40 countries, as well as with governmental, intergovernmental, and nongovernmental bodies.

## International Center for Terrorism Studies (ICTS)

Established in 1998 by the Potomac Institute for Policy Studies, in Arlington, VA, ICTS administers IUCTS activities and sponsors an internship program in terrorism studies.

## Inter-University Center for Legal Studies (IUCLS)

Established in 1999 and located at the International Law Institute in Washington, D.C., IUCLS conducts seminars and research on legal aspects of terrorism and administers training for law students.

## International Advisory and Research Council

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<i>Prof. Christopher C. Joyner *</i>	<i>Georgetown University</i>	<i>Prof. B. Tusruki</i>			<i>University of Tokyo</i>
<i>Prof. Tanel Kerkmae</i>	<i>Tartu University, Estonia</i>	<i>Prof. Amechi Uchegbu</i>			<i>University of Lagos</i>
<i>Prof. Borhan Uddin Khan</i>	<i>University of Dhaka</i>	<i>Prof. Richard Ward</i>			<i>The University of Illinois at Chicago</i>
<i>Prof. Walter Laqueur</i>	<i>CSIS</i>	<i>Prof. Yong Zhang</i>			<i>Nankai University, China</i>
<i>Francisco Jose Paco Llera</i>	<i>Universidad del Pais Vasco</i>	<i>*Deceased</i>			

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## Fall 2017 Internship Program

Angel Chaverri	University of California Santa Barbara	Rena Lee	University of Maryland
Trev Hadachek	American University	Charles Murphy	American University
Emily Kennedy	University of Maryland	Isaac Shorser	American University

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